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III

REPORTS

OF

CASES

ADJUDGED IN THE

SUPREME COURT

OF

PENNSYLVANIA.

BY HORACE BINNEY.

VOL. III.

PHILADELPHIA:
PUBLISHED BY FARRAND AND NICHOLAS.
1811.

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District of Pennsylvania, to wit:

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JUDGES

OF THE SUPREME COURT OF PENNSYLVANIA.

WILLIAM TILGHMAN, Esq. — Chief Justice.
JASPER YEATES, Esq.
HUGH H. BRACKENRIDGE, Esq. } Justices.

ATTORNEY GENERAL.

RICHARD RUSH, Esq.

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AUG 1 . 1898

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CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

Middle District. June Term, 1810.

1810.

Sunbury, Wednesday, June 6.

BARLOW *against* THE COMMONWEALTH.

IN ERROR.

THE plaintiff in error was convicted in the sessions of *Luzerne* county of a perjury, for which he was sentenced by the judgment of that court, in *November* 1806, to pay a fine of ten dollars, *to be imprisoned at hard labour in the penitentiary house of Philadelphia for two years*, and to pay the costs.

Prior to the act of 4th *April* 1807, no person convicted of perjury in any of the counties in this state, except the county of *Philadelphia*, could be sentenced to imprisonment in the gaol of the county of *Philadelphia*.

Dyer for the plaintiff in error argued that the judgment was erroneous, because the court had no authority to direct the imprisonment at hard labour, to be in the penitentiary of *Philadelphia*. The act of 3d *April* 1804, under which the defendant below was indicted, inflicts a fine, and imprisonment at hard labour during any term not exceeding seven years, at the discretion of the court before whom the conviction shall be had; 6 *St. Laws* 513; but it says nothing of the place of imprisonment, which of course must be in the proper county.

Hepburn for the commonwealth cited the acts of 5th *April* 1790, 2 *St. Laws* 801, 21st *March* 1806, 7 *St. Laws* 570, and 4th *April* 1807, 8 *St. Laws* 134, and argued in support of the judgment under their various provisions.

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BARLOW v. COMMONWEALTH.

TILGHMAN C. J. delivered the Court's opinion.

This is an indictment for perjury. Barlow was convicted in the court of Quarter Sessions of *Luzerne* county, and judgment was given in *November* 1806, that he should be imprisoned at hard labour, &c. for two years in the gaol of the county of *Philadelphia*, and pay a fine of ten dollars. The error assigned is, in that part of the judgment which directs the imprisonment to be in the county of *Philadelphia*.

By the 4th section of the act of 5th *April* 1790, intitled "An act to reform the penal laws of this state," every person convicted of an offence, for which by the laws in force before the act intitled "An act to amend the penal laws of "this state," burning in the hand, cutting off the ears, nailing the ear or ears to the pillory, placing in and upon the pillory, whipping or imprisonment for life may be inflicted, shall, instead of such parts of the punishment, be confined and kept at hard labour, &c. for any term not exceeding two years at the discretion of the court. This general description includes the crime of perjury. By the 28th section of the same act, the malefactors sentenced to hard labour in the several counties of this state, other than the county of *Philadelphia*, shall be employed in the several gaols and workhouses of the respective counties in which they were convicted; but by the 34th section of the same act, any felon convicted in any county, other than the county of *Philadelphia*, of any *felony*, for which he shall be sentenced to hard labour for the space of twelve months or upwards, may, at the discretion of the court before whom he shall be convicted, within three months after such conviction be removed to the gaol in the county of *Philadelphia*, and therein be confined at hard labour, &c.

By the act of 21st *March* 1806, the court before whom any person is convicted of *felony* or *larceny*, and sentenced to undergo imprisonment at hard labour, &c. for any term not exceeding three years, may direct the imprisonment, &c. to be in the gaol of any county within the commonwealth, or in the gaol and penitentiary of *Philadelphia*.

By the act of 3d *April* 1804, a person convicted of per-

jury, may be punished by imprisonment at hard labour, &c. for any term not exceeding seven years, at the discretion of the court before whom he was convicted.

From the above review of the several acts of assembly on this subject, it appears, that a person convicted out of the county of *Philadelphia*, of any offence, other than felony or larceny, could not be sentenced to imprisonment, &c. in the gaol of the county of *Philadelphia*. An alteration has been made by the act of 4th *April* 1807, which can have no effect on this case, being subsequent to the judgment. The Court are therefore of opinion, that the judgment of the court of General Quarter Sessions, for the county of *Luzerne*, was erroneous, and must be reversed.

Judgment reversed.

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Road from WARRIOR RUN.

Sunbury, Saturday, June 9.

A report of a road by viewers, &c. without a plot or draft in addition to the courses and distances, is bad.

UPON a *certiorari* to the sessions of *Northumberland*, the proceedings and reports of the viewers and reviewers of the road in question, were sent up to this court, and came on to be heard upon exceptions.

The *first* exception was, "That neither the viewers nor "reviewers made any plot or draft of the said road, but only "reported *by courses and distances.*"

Kidd in support of this exception cited the act of 6th *April* 1802, *sect.* 1., 5 *St. Laws* 178, as decisive of the point, it being mandatory upon the viewers to return both a plot or draft, *and* the courses and distances.

PER CURIAM. This exception is undoubtedly fatal, and has been so held many times.

Proceedings set aside.

1810.

Sunbury, Monday, June 11.

CARKHUFF *against* ANDERSON.

A judgment in *Pennsylvania* is a lien on every kind of equitable interest in land, vested in the debtor at the time of the judgment. *Held* therefore to bind the interest of a *Connecticut* settler in land within the *Seventeen Towns*, who was intitled by the act of 1799 to obtain a patent upon terms, although not he, but his assignee, after the judgment and the sale, complied with the terms, and then for the first time obtained the confirmation.

THIS was an appeal from the decision of the Chief Justice at a Circuit Court for *Luzerne* in *June* 1809.

It was an ejectment for a tract of land within one of the seventeen townships, to which the plaintiff set up a title under a certain *William Craig*, who held it as a *Connecticut* claimant by deed dated the 30th *June* 1798. On the 4th of *April* 1799, the commonwealth of *Pennsylvania* by an act of the general assembly, gave to the *Connecticut* settlers within the seventeen townships, whose rights had been acquired under *Connecticut* prior to the decree at *Trenton*, an option to receive a patent for their tracts upon paying a sum of money, provided the *Pennsylvania* claimant of the same land should release it to the commonwealth. On the 5th of *September* 1799, a judgment was obtained against *Craig* by *Matthias Hollinback*, who revived it by *scire facias* in *January* 1803, levied upon the land in *August* following, and finally in *August* 1806 caused it to be exposed to public sale by the sheriff, from whom it was purchased by *Carkhuff* the plaintiff.

The copy of a *Connecticut* settler's deed deposited according to act of assembly in the land office, is, if certified under the seal and signature of the proper officer, as good evidence as the original would be.

In order to shew that the defendant held under *Craig*, the plaintiff's counsel offered in evidence on the trial, a copy of a deed from *Craig* to *Anderson*, dated the 10th *January* 1801, for the land in question, certified by the secretary of the land office, under his official seal, to be a true copy of the original deposited in his office; and which, by the copy, appeared to have been proved by a subscribing witness. This evidence was objected to, but was admitted by the Chief Justice, under the authority of an act of the 9th of *April* 1781. Parol evidence was then given to shew *Craig's* continuance in possession until some time in 1803, and the defendant's knowledge of *Hollinback's* judgment and execution in that year.

The defendant relied upon a patent from the commonwealth, dated the 30th *November* 1808, which he had claimed and received under the act of 4th *April* 1799.

The only points in the cause, were, whether the judgment

against *Craig* operated as a lien on the land held by him under the *Connecticut* title; and whether the certificate of the secretary of the land office was competent evidence; and in order to bring these points before the Supreme Court, it was agreed that a verdict should be entered for the plaintiff, and that a motion for a new trial should be overruled, to ground an appeal by the defendant.

Evans for the appellant, contended upon the first point, that at the time of *Hollinback's* judgment, *Craig* had no title to the land which was recognised by the law of *Pennsylvania*. He had not even an equitable right to it, because it had been solemnly settled by the decree at *Trenton*, and had been repeatedly asserted by *Pennsylvania* in her legislative acts, that *Connecticut* was wholly without pretence of title to this district of country, and that the settlers under her were of course but mere trespassers. All that the act of 4th *April* 1799, 4 *St. Laws* 400, had done, was to give to the *Connecticut* settler an option to obtain a title by performing certain conditions. But he remained in his former situation until the election was made. There was no compulsion upon him ever to accept the terms; and it did not appear at the date of the judgment that he ever would accept them. In fact *Craig* never did. The question then is not whether a judgment will bind an equitable interest in lands, but whether it is a lien upon a mere claim or pretence, which the possessor makes against the law of the land, and which after the judgment he transfers to a third person. There can be no doubt that it is not.

The copy of the deed could not have been evidence, the original being in existence, unless made so by statute. The act, under which the original of the deed was deposited in the land office, does not authorize the secretary to give a copy of it; it contains no other provision, but that *Connecticut* settlers applying for the benefit of the act of 1799, shall surrender to the commissioners all deeds and documents of title under the Susquehanna Company, to be transmitted to the secretary. But there it stops. 5 *St. Laws* 206. There should have been a subpœna to the secretary, with a clause of *duces tecum*. The act of 9th of *April* 1781, 1 *St. Laws*

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891, does not apply to the case. That act makes copies of deeds, entries and papers of the land office, duly attested by the respective officers, under their hand and seal of office, as good evidence as the original could be. But the deed of a *Connecticut* settler is not a deed of the land office; nor was it intended by the legislature that any paper should be deemed to have that character except where it emanated from the land office, and where the same authority vouched both original and copy.

Dyer and *Hall*, for the appellee, argued, that whatever might have been the nature of *Craig's* claim before the act of *April* 1799, yet from the date of that law he had an equitable right to the land, something in the nature of a preemption, a conditional equity, which it was in his power, and in the power of his assignee to make absolute, and which accordingly was made so by the defendant. It was not in the power of the latter, to defeat *Hollinback's* judgment, of which he had both actual and constructive notice before he obtained his patent, by saying that *Craig* had no estate or interest in the land, when his defence rested upon the confirmation of that estate by the commonwealth. The confirmation being made after the judgment and sale, is of no avail to defeat the judgment creditor and the purchaser under him. If tenant in tail mortgages for years, and then suffers a common recovery, this lets in the mortgage; *Beck* v. *Welsh*, (*a*); and upon the very principle which lets us in to the benefit of the confirmation by the state; namely, that he who recovers, cannot say that *he* against whom he recovered had but an estate tail. Certainly, *Craig* had at least a preemption right. Now that kind of right was held in *Duncan* v. *Walker* (*b*) to be an interest in the land, and to descend to the heir; and if it is an interest in land, it is bound by a judgment, which in this state fastens upon every interest in lands. After the compensating act of 1799, *Connecticut* titles to land within the seventeen towns, were uniformly considered as real estate, and went in the usual course of descent.

Upon the question of evidence, the appellee's counsel were stopt by the Court.

(*a*) 1 *Wils.* 276. (*b*) 2 *Dall.* 205.

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CARKHUFF v. ANDERSON.

TILGHMAN C. J. There is one point in this cause on which I shall give no opinion, because I gave an opinion on the trial in the Circuit Court; that is to say, whether the copy of a deed from *William Craig* to the defendant, certified under the hand and official seal of the secretary of the land office, the original being deposited in the said office according to the provision of an act of assembly, was legal evidence? My opinion was, that it was evidence.

But on the principal point of the cause, which is of considerable importance to the people of *Luzerne* county, I gave no opinion on the trial; it being agreed by the parties that the matter should be brought before this Court. I will briefly state the facts on which the point turns. *William Craig* had title derived from the state of *Connecticut* to the land in dispute. Being in possession under this title, *Matthias Hollinback* obtained a judgment against him on the 5th *September* 1799. A *sci. fa.* issued on this judgment to *November* term 1802, on which judgment was entered *January* 1803. A *fi. fa.* issued to *August* 1803, which was returned "levied" on the land in dispute. The land was afterwards sold by a regular course of proceeding to the plaintiff, who received a deed from the sheriff of *Luzerne* county, dated 26th *January* 1807. The land lies within that part of the county, known by the name of the *Seventeen Towns*. The defendant on the 10th *January* 1801 purchased the same land of *Craig*, and obtained a deed from him. The defendant afterwards laid his title before the commissioners appointed under the act of 4th *April* 1799, intitled "An act for offering compensation to the *Pennsylvania* claimants of certain "lands within the seventeen townships of *Luzerne*," &c. &c. and obtained a patent from the commonwealth, dated 30th *November* 1808.

The question is whether the judgment of *Hollinback* was a lien on this land? The defendant contends that it was not, because at the time of the judgment, *Craig* had no title which was of any validity under the law of *Pennsylvania*, and that the title obtained by his patent, is to be considered as an original title, emanating from the commonwealth on the day of its date.

It is well known that the state of *Connecticut* once made

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an unfounded pretension to part of the land included in the charter of *Pennsylvania*, and that the title has been repeatedly and solemnly decided in favour of *Pennsylvania*, both in the courts of the *United States*, and of this state. It is also well known, that the title under *Connecticut* has been reprobated by various acts of assembly. But it is very material, that prior to this judgment, the above mentioned act of 4th *April* 1799 had passed, by which it was proposed, that those persons who held lands under a *Pennsylvania* title within the *Seventeen Towns*, should release to the commonwealth on receiving compensation, and in that case the title was to be confirmed to those persons who had acquired rights under *Connecticut*, prior to the decree at *Trenton*, provided they came forward, and proved their title before commissioners appointed by virtue of that act, and complied with the terms prescribed by the act. It cannot be said that *Craig* had no interest in the land after this act of assembly. He had the right of preemption, on the contingency of the *Pennsylvania* claimant's releasing to the commonwealth, which in this case has been done. And this right of preemption, he conveyed to the defendant for a valuable consideration, who has availed himself of it, and by means of it, obtained a complete legal title. It is therefore with an ill grace, that the assertion, of *Craig's* having no interest, comes from the mouth of the defendant. But it is said, that although *Craig* had the right of preemption, he was at liberty to pursue that right or not. This argument can have no weight, because his assignee has pursued it. A person who holds land under an application entered in the land office of the late proprietaries, and a survey, without having paid any part of the purchase money, might as well allege, that a judgment is no lien on his land, because he is at liberty to give up the land, and never complete his title. And yet the lien in that case would not be contested. The lien of judgments has been extended in *Pennsylvania* beyond the limits of the common law. In *England*, a judgment is not a lien on an equitable estate. But in as much as we have no court of Chancery, which is resorted to in *England*, to obtain relief in equitable cases, we have been compelled, in order to obtain equity, to alter the principles of the common law.

Accordingly it has been long settled that a judgment is a lien on every kind of *equitable* interest in land. It is a lien on every kind of right, vested in the debtor at the time of the judgment; and on the *vend. exp.*, the sheriff sells and conveys all his right, such as it may be. I am therefore clearly of opinion, that *William Craig* had an interest which was bound by the judgment of *Hollinback*. I desire it to be understood, that I do not mean to give any opinion, except on the point submitted to the Court, viz. whether *Craig* had an interest capable of being bound by the judgment. If the point had been, whether the defendant would not have a right to hold the land, until he is reimbursed the money, which he may have paid the commonwealth for the confirmation of the title, that would have been a very different question.

YEATES J. I am perfectly satisfied that the lands in question, were bound by the judgment of *Hollinback*. I have nothing to add on that point.

The question, whether the copy of the deed from *William Craig* to the defendant *John Anderson*, duly certified by the secretary of the land office, under his hand and official seal, should have been admitted in evidence in this case, presents itself to us for decision on the appeal.

The commissioners, appointed under the act of the 4th *April* 1799, were authorized to ascertain the rights or lots of *Connecticut* claimants within the seventeen townships in the county of *Luzerne*, who were settlers there at or before the time of the decree at *Trenton*, and which were particularly assigned to them, agreeably to the regulations in force among them prior to the said decree. The tenth section of the supplement thereto, passed on the 6th of *April* 1802, expressly directs, that the commissioners shall receive, from each *Connecticut* settler applying for a certificate, every deed and document of title under the Susquehanna Company, in the power or possession of such settler, previous to the issuing of any certificate for such lands, which should be transmitted to the secretary of the land office. The patent, issued in this instance to the defendant, does not recite the *Connecticut* settler, under whom he claimed and came into possession; and

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it became necessary that the plaintiff should shew this by legal proof.—It has been objected, that if the original deed could not be procured, the copy ought to be proved by witnesses, who compared it with the original, and that no law authorized the secretary of the land office, to certify such copies. I take it, that this case is governed by the plain words of the law of the 9th of *April* 1781. An office was thereby established, consisting of three persons, or officers, called the Secretary of the Land Office, Receiver General, and Surveyor General; and by the third section it is directed, that "copies "of *deeds*, entries, and papers of the said office, duly attested "by them, under their hand and seal of office, shall be as "good evidence, as the originals might or could be." It has been said, that the *deeds* here spoken of, mean patents, which are to be certified by the master of the rolls. But at the time of passing of this act, the master of the rolls was not a competent member of the board of property, and consequently the word *deeds* could not by any possibility have reference to him. The word must have some meaning as used by the legislature, and must necessarily include any deed deposited in the three offices by virtue of any legislative act or provision. Besides, the fee of the master of the rolls for exemplifying patents was pointed out by former laws, and his power herein in no degree depended on the act of 9th *April* 1781. It would be unnecessary to amplify on this subject. I am clearly of opinion, that the copy of the deed, certified as I have mentioned, was properly received in evidence on the trial, and that the judgment of the Circuit Court should be affirmed.

BRACKENRIDGE J. The question in this case has arisen from the history of legal tenure in that part of the county of *Luzerne*, which consists of what are called the Seventeen Townships. And I must assume this history as known, in order not to be under the necessity of going minutely into a review of it.

The appearance of right which the Susquehanna Company, a people of *Connecticut*, had, to advance a claim to this district of country, is in my mind, in considering the case before me. I do not view them in the light of trespassers, with

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a full knowledge of their want of title. At all events, the bulk of them do not seem to have been apprised of their want of title. And I make a great distinction between trespassers knowing, or having good reason to know, their defect of title, and such as may reasonably be supposed to be ignorant of what they are about.

Before the decree of *Trenton*, the most intelligent, and the best informed, might have been led to believe, that the part of the country in question, was settled under a good title from the state of *Connecticut*. It was not so clear a case as not to admit of a difference of construction. Certain it is, that a body of people did settle on this district, under an idea of having a good title from the Susquehanna Company. By the decree of *Trenton*, it was ascertained that this allegation of title was without foundation. But in favour of those who had settled under the idea of a good title, and with an expectation of enjoying the land which they were improving and defending, at great risk and much loss, from the common enemy during the revolutionary war, there is a claim, which ought not wholly to be disregarded. I do not call it a *right*, but a claim on the ground of moral obligation. It would have been an exaction of the *summum jus* on the part of the state, to have carried into effect their right, wholly disregarding such a claim. It would have been against good conscience in an individual to do it. It was a case where a demandant, recovering the freehold, ought not to take it without an allowance for labour expended, and improvements made. The state of *Pennsylvania* thought it against good policy to inforce the state right by process of law, and to dispossess the inhabitants; and I hold it to be a principle of humanity, and even of moral integrity, that wherever an individual has entered upon unimproved land, taking the history of the settlement of our country into view, he ought not to be dispossessed, provided he is able and willing to pay for the land in an unimproved state, with a reasonable allowance to the demandant for his trouble, expense, and time lost in pursuing his right, and what in equity he ought to have, taking all circumstances into view. I can have no hesitation in saying, that the government at all times, in such cases, where the title comes from them, or where they are called upon by uncom-

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mon means to inforce the state right, are justifiable in refusing the process of law to dispossess, or the aid of uncommon means, the *posse comitatus*, or militia; in consideration, at the same time, that they, the government, are willing to make a reasonable compensation to the demandant for lands of which, for their sakes, they are unwilling to dispossess the inhabitants. The *salus populi* gives what is called the *transcendental* right in such cases; the supreme law, to which all other considerations are subordinate.

It was on this principle that the act of the 28th of *March* 1787, for ascertaining and confirming to certain persons called *Connecticut* claimants, the lands claimed by them within the county of *Luzerne*, was passed; and though repealed by a subsequent act of 1st *April* 1790, and recited in the preamble to this act as unconstitutional, my ideas of it still remain the same, on grounds of policy and of natural justice which I entertained of it, when I gave my vote in the legislature, for the passing of it into a law; and though in the case of *Vanhorne's Lessee* v. *Dorrance*, 2 *Dall.* 304, this idea of the unconstitutionality of the act is sustained, yet it is on what appears to me a narrow view of the subject; and on this ground chiefly, that a constitutional compensation must be money, and not land; whereas it would seem to me that in cases like this, the constitutional compensation for land would be land, and not money. By the common law, where a man and his heirs are bound to warranty, "he is to yield other lands and tenements to the value of those that shall be evicted." *Co. Litt.* 364.

It is a principle of law, that one having no title at the time of conveying, but afterwards acquiring a title, to real estate, it shall inure to the use of the grantee. I should therefore incline to think, that the possession under claim of title, which the *Connecticut* settler had prior to the decree of *Trenton*, might have been bound by a judgment, so that the after-acquired title should inure to the advantage of the judgment creditor. But be this as it may, by the act of the 4th of *April* 1799, for offering compensation to the *Pennsylvania* claimants in certificates, in case of lands settled before the decree of *Trenton*, and to the *Connecticut* settlers of this description, patents from the commonwealth on instalments to be

paid, the claim of the settler became a right known to the law, and beyond all question the subject of a lien. It became an *estate in equity*, which is the subject of a lien in *Pennsylvania*. It shall not lie in the mouth of him purchasing and taking the advantage of this kind of title, whatever it might be, to allege that it was such an interest as could not be considered real estate, and the subject of a lien. He took it *cum onere;* and it would seem to me that a judgment was binding on it from the legal or constructive notice of the record, independent of the actual notice in this case.

I can make no distinction, in respect of the attachment of a lien, between the interest in the land, which the *Connecticut* settler had after the 4th of *April* 1799, and that of any other real estate held by an equitable title, that is, under an agreement to be carried into effect. It was considered real estate by the judgment creditor, and in the general understanding of the country; and *communis opinio* is of authority. *Co. Litt.* 365. Were it necessary to pursue the analogy of law to some extent, I should think the case adduced of a tenant in tail, having a judgment against him, and suffering a common recovery, the judgment against the tenant in tail, attaching on the fee simple which he has acquired, is in point. It is a question said not yet to be decided here, whether after-acquired lands are bound by a prior judgment; but I can have no doubt, but that where there is the inception of a title, such as a court of Chancery would carry into effect, it may be bound. The case of a preemption right alluded to, bears upon this, and establishes an analogy.

Judgment affirmed.

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Sunbury, Monday, June 11.

Lessee of DUNCAN *against* CURRY and Others.

Between two applications of the 3d *April* 1769, that which came out of the wheel first, and was lowest in number, has the preference.

It is a matter of fact for the jury to decide which of two applications is most descriptive of the land in dispute, or whether either applies to it.

An application descriptive of the land, is to be preferred to one not descriptive of it, though such descriptive application is higher in number, provided due diligence is used in obtaining a survey.

If the holder of the preferable application does not put it into the surveyor's hands, and the holder of the inferior application does, the surveyor may make the survey on the inferior application; but if before the return of survey, the holder of the preferable application accounts for his delay, the surveyor *may* and *ought* to make the return for him.

THIS was an appeal from a decision of Mr. Justice *Brackenridge*, at a circuit court for *Centre* county, in *June* 1808.

The plaintiff claimed the land in question under two applications for 300 acres each; one, in the name of *John Burns*, dated the 3d of *April* 1769, No. 1544; the other, in the name of *Roger Flahavan*, of the same date, No. 1124. The former application called for land in the long *Limestone Valley*, where the Indian or trader's path passes from the *Bald Eagle's Nest* to *Frankstown*, including a limestone spring near *Alexander Robinson's*. The latter called for lands in the same valley, "near lands of *John Burns*."

On each of these applications a survey was made by the late Judge *Smith*, then deputy surveyor of the district, on the 24th *October* 1770; but although the land surveyed was in the same valley with the land called for, the description was a bad one.

When these surveys were returned, was not shewn to the jury; but on the 4th of *September* 1783, *Margaret Duncan*, the lessor of the plaintiff, to whom a moiety of each had been previously conveyed, paid the purchase money and obtained a patent.

The defendants were tenants of *George Robinson* junior, who claimed under an application in his name dated the 3d of *April* 1769, No. 471, for 300 acres on the north side of the *Bald Eagle* creek, upon the head waters of the *Biglick* run. Although this was a loose description of the land in question, yet it was in proof that it was intended for this land by the person who furnished the description to *Robinson's* father.

Upon this application, only seven shillings, the fees of office, were paid. It was delivered in the spring of 1770, by

After a return made in favour of the holder of an inferior application, the holder of the application originally intitled to a preference may enter a caveat, and try his case before the board of property, who if there has been no unreasonable delay may order a patent to the caveator: and in case either party is dissatisfied he may bring his case before a court of law, where the order of the board of property is not considered as conclusive.

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George Robinson the elder to *Charles Lukens*, to be surveyed; for although *Thomas Smith* was the deputy surveyor of the district, where the land lay, yet the surveys of *Lukens* within the same district had been recognised. *Lukens* promised to make the survey, and appointed a day to meet *Robinson* on the ground, but did not come. One *M'Donald*, the man who furnished the description to *Robinson*, and who was employed by him to shew the land to *Lukens*, then applied to Mr. *Smith* to make a survey; and the latter being assured that the order of survey was in the hands of *Lukens*, made a survey in *June* 1770 at a place shewn to him, but at some distance from the land in dispute. This survey however was not returned; for *Robinson*, upon learning from *M'Donald* where the survey was made, declared it was not in the right place, and that he would not have it; but in the year 1775 *Robinson* applied to *Lewis Lewis* the assistant deputy surveyor of the district, and got him to make a survey of the land in the ejectment. He then took possession of the premises, and continued there until the bringing of this action; but never obtained a return of the survey into office, until the year 1797.

Upon this evidence *Brackenridge* J. charged the jury as follows:

The applications of the plaintiff are both of the 3d of *April* 1769; that of *Flahavan*, No. 1124, and that of *Burns*, No. 1544.

The application of the defendants is of the 3d of *April* 1769, No. 471.

Thus the application of the defendants is intitled to the preference in point of number, which depends on the conditions of the opening of the office for the sale of these lands.

Which of these applications, those on the part of the plaintiff, or that on the part of the defendants, is the most appropriate to the ground in controversy, is a matter of fact for the jury.

One appropriate has a preference over one not appropriate; because for the one there is an order of survey, and preceding grant. In the other it is acceptance only, that by relation and confirmation can ratify the survey made.

But the earlier number not being put into the hands of the

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surveyor, before the survey made on the later number, it loses its preference; and the more appropriate not being put into the hands of the surveyor before the survey made on the less appropriate, loses *its* preference. That is, the earlier number, and the more appropriate lose their preference of having their survey made; but the preference is lost no further than respects the making the survey. The right of preference may be brought before the surveyor at any time before the return, and claiming the preference and accounting satisfactorily for not coming forward and claiming it before, he may have the return. This not being done before the return, the preference is lost so far as respects the right of having the return made; but after the return the right of preference is not wholly gone. It may be brought before what is called the board of property, and this preference of claim decided on. Even where the board of property decide on the right of preference, the right is not wholly gone, for it may be tried at law. But in case even where the application is less appropriate, or where it is the later number, or where it is both, but was the only one put into the hands of the officer to survey upon, the only one he was called upon to return, or where there was no caveat or call before the board, and under these circumstances a patent is issued, it is too late to talk of a preference in a court of law. It might have been that had the party come forward and shewn his rights, the opposite claim might have been withdrawn. But where the other party, hearing nothing of an opposite claim, is led to pay the purchase money, I think it ought to conclude.

The present case is of that nature. The applications of the plaintiff, even supposing them to be the less appropriate, as they are certainly later numbers, have the advantage of the defendants' application, which did not come forward to the surveyor, either before the survey made, or after the survey and before the return.

It cannot be heard from a party that he did not hear of the survey of an adversary order, made or returned, so as to object to it; for what is done by public officers, and the records of a public office, must be known to all people, or considered to be known. It is what the law calls constructive notice, and binds equally with actual. I must therefore conclude notice.

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and by non-claim the right of preference is waived. I do not think it necessary to lay stress upon the point of actual notice, which was the case, as may be collected from the testimony. The claim of the defendants therefore, on the ground of office right, would seem to be gone.

These principles I deduce from the conditions by the late proprietaries of the soil, annexed to grants of this nature; from the regulations of the proprietary office in carrying these grants into effect; from acts of assembly since the commonwealth succeeded to the estate of the late proprietary; from the regulations of the land office since; from the knowledge I have of the principles adopted and sanctioned by courts of justice; from my own ideas of justice between individuals, and ideas of public convenience and the general interest of the community. If these principles are correct, it remains to apply them to the case before us, to weigh the reason and justice of the present case on grounds of natural equity and principles of public safety.

Let us then take up the circumstances of this case a little from the testimony, and weigh them.

His honour then stated to the jury the manner in which the evidence was affected by these principles of law, expressing a pretty strong opinion in favour of the plaintiff; and the jury accordingly found their verdict. A motion was then made by the defendants for a new trial, upon the ground of misdirection, which was overruled, and an appeal made to this court.

The argument here by *Huston* for the plaintiff, and by *Watts* and *Duncan* for the defendants, turned principally upon the evidence, which it is unnecessary further to detail. The misdirection was said to consist in the application of the principles stated by his honour, to the facts of the case; but as no memorandum of the charge was preserved, except what is above given, it will be observed by the opinions of the court, that they take no notice of any thing but the principles themselves as general rules, and the merits of the application for a new trial, as they appeared from the facts reported.

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TILGHMAN C. J. The defendants in this case moved for a new trial, on the ground of a misdirection in point of law by the judge of the Circuit Court before whom the cause was tried. It is to be regretted that the counsel, who took down the judge's charge, have omitted a material part of it. In the course of the charge, it appears that the judge laid down some general principles with regard to warrants, applications, and surveys. They are to the following effect

1. That between two applications entered 3d *April* 1769, commonly called *lottery applications*, because the preference was decided by *lottery*, that which came out of the wheel *first*, and was *lowest* in number, had the preference.

2. That the jury were to decide, as a matter of fact, which of the two applications was most descriptive of the land in dispute, or whether either of them could be properly applied to that land.

3. That an application descriptive of the land, is to be preferred to one not descriptive of it, though such descriptive application is higher in number, provided due diligence is used in obtaining a survey.

4. That if the holder of the application intitled to the preference, does not put it into the hands of a surveyor, and the holder of the other inferior application puts it into the surveyor's hands, in such case the surveyor may make the survey on the inferior application; but still, if the holder of the application originally intitled to the preference comes forward before the return of survey, and accounts satisfactorily for his delay, the surveyor *may* and *ought* to make the return for him.

5. That after a return made in favour of the holder of the inferior application, the holder of the application originally intitled to preference, may enter a caveat in the land office, and bring his case before the board of property, who if they are of opinion that there has been no unreasonable delay, may order a patent to the caveator.

6. That after all these proceedings either party may bring the case before a court of justice, where the decision of the board of property is not considered as conclusive.

I think these general principles are not to be denied, though like other general rules, they are subject to exceptions. The

judge having laid down these principles, proceeded as follows: "If these principles are correct, it remains to apply "them to the case before us; to weigh the reason and justice "of the present case, on grounds of natural equity and prin- "ciples of public safety. Let us then take up the circum- "stances of this case from the testimony, and weigh them." Here the charge breaks off abruptly, and it is impossible for this court to say, whether on the whole there was misdirection in point of law or not. It was in the power of the defendants' counsel, to have taken a bill of exceptions to the charge, or to have requested the judge to reduce it to writing according to the act of assembly, and in either case, we should have had every thing which was objected to, on the record. We cannot presume that there has been a misdirection, in order to avoid the verdict of the jury. But as a motion for a new trial is an appeal to the discretion of the court, it is proper that we should consider whether, from the report of the evidence which has been made, any injustice has been done to the defendants.

They claim under an application dated 3d *April* 1769, No. 471, which to make the best of it, contains but a vague description, and might be applied to other spots, as well as to the land in dispute. For this application *George Robinson* esquire paid 7*s*. the fees of office, but he paid no part of the purchase money. The land was in the district of *Thomas Smith* esquire; but it was proved, that *Charles Lukens* sometimes executed warrants within Mr. *Smith's* district. *Robinson* applied to *Lukens* to make a survey on his application; and it is probable that the order for survey was put into *Lukens's* hands in the spring, or early part of the summer 1770. *Lukens* promised to make the survey, and appointed a time, but failed in his appointment. Thus far the party may be said to have used due diligence. About the month of *June* 1770, one *M'Donald*, who had furnished *Robinson* with the description by which he entered his application, and who was employed by him to show the land to *Lukens*, applied to *T. Smith* to make a survey. *Smith*, being assured by *M'Donald* or one *Dick* who was with him, that the order of survey was in *Lukens's* hands, made a survey in the place shown to him, at some distance from the land in dispute. This survey was

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never returned, because *Robinson*, on being told by *M'Donald* in what place it was made, declared it was not the right place, and he would not have it. But it does not appear that he applied again to Mr. *Smith*, or informed him that there was a mistake in the survey which he had made. On the 24th *October* 1770, *T. Smith* surveyed the land in dispute on an application in the name of *John Burns* dated 3d *April* 1769, No. 1544. In the year 1775, *Robinson* applied to one *Lewis Lewis*, an assistant of the deputy surveyor of the district, and got a survey made on his application, which was not returned till the year 1797. In the mean time *Margaret Duncan* the plaintiff became the owner of the survey made on the application in the name of *Burns*, and in the year 1783, paid the purchase money and obtained a patent from the commonwealth. Under all these circumstances, it appears to me, that *Robinson*, under whom the defendants claim, has not prosecuted his application with reasonable diligence. On the contrary he has been guilty of very great delay. He ought to have come forward, and demanded a survey on the spot for which he contended, as soon as he was informed of the survey made by Mr. *Smith;* he should have entered a caveat in the land office, against the survey made on *Burns's* application. If this had been done, and he had proved his claim to be just, *Burns's* application might have been surveyed in some other place. But by *Robinson's* lying by, Mrs. *Duncan* was induced to pay her money and take out a patent. She has paid the full purchase money. *Robinson* paid nothing. So far from the defendants' being wronged by the verdict, I think the law and justice of the case are both strongly with the plaintiff. My opinion therefore is that the judgment of the Circuit Court be affirmed.

YEATES J. I have seen the opinion which has been delivered by the Chief Justice, and entirely concur therein. I also agree to the general principles of the judge who tried the cause, respecting the legal operation of locations, upon the opening of the land office on the 3d *April* 1769. Applications, which do not exclusively call for particular spots of land, were never deemed efficacious to give a title to lands, unless they were reduced to certainty by a survey.

They have been called the mere expressions of a will to take up lands; but they have never been construed as contracts binding on either party, when standing alone. Titles will relate back to the applications when followed up with due diligence: but it would be unreasonable and unjust, that indescriptive early locations should prevent the settlement of the country, by being kept in the back ground. Later orders of survey duly prosecuted, though equally indescriptive, will be intitled to a preference over them. The intention of the party is of no avail, as to the lands he applies for, unless that intention is apparent on the face of his application, and becomes thereby unequivocal notice to other appliers. This point has been often decided. I consider the principles laid down on the trial, as referrible to the circumstances of the case then trying, and not settling the different branches of a system, which was to govern all future cases. A location is a good inception of title, but it may be abandoned either wholly or partially. Evidence of this abandonment is generally submitted to the decision of the jury; but it may often happen, that instances may occur of such abandonment, wherein the court may feel no difficulty in giving their sentiments to the jury, that the gross delay and *laches* of the party were conclusive on him. This happened in *Power's Lessee* v. *Hepburn*, and *Duncan's Lessee* v. *Wallis*, cited on the argument; and in many other cases.

It clearly appears from the testimony, that the lands in question fell within the district of *Thomas Smith* esquire, and to him application was made to execute the order in *June* 1770. *Alexander M'Donald* swears, that he was appointed to shew the deputy surveyor the lands. If such was the truth of the case, and the survey was made according to his instructions, it would be binding on the holder of the location. But admitting the fact to be otherwise, for which I see no reason, then the deputy surveyor was constituted his agent, and he was bound by his acts, if he acquiesced in them. When *Robinson* was informed by *M'Donald* of the survey which had been made, on his behalf, he was indispensably bound to apply to Mr. *Smith*, to rectify the supposed mistake of the call in his order, and to execute the same according to his ideas of the location. If Mr. *Smith*

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refused or neglected to comply with this requisition, he might have applied to the surveyor general for a special order of survey to some other person; or he might state his case to the board of property, for their interposition; or if a survey had been made on the lands he contended for, under an adverse right, he might caveat the return and acceptance thereof, and thus obtain a fair hearing of his pretensions. Some step of this nature he should have pursued without delay. Negligence and *laches* were fatal to his interests, and have uniformly been so held: unless he followed up his pretensions with vigilance, he could not claim the benefit of a contract, and the common welfare imperiously demanded, that he should be postponed. But how did *Robinson* prosecute his claim in the present instance? He first waits five years, before he obtains a survey to be made by *Lewis Lewis*, and then delays the return thereof for twenty-two years longer until 1797. In the mean while, in 1783, the lessor of the plaintiff pays the full purchase money, and obtains the legal title, under the survey made on the application of *Burns* on the 24th *October* 1770, without any notice of an adverse claim. I see no merits in the case of the defendants, nor misdirection on the part of the judge of the Circuit Court, and am therefore clearly of opinion, that no new trial should be granted, under all the circumstances of the case.

New trial refused, and
Judgment affirmed.

3b 22
6s 104
6s 587

The Overseers of the Poor of Forks Township in Northampton County *against* The Overseers of the Poor of Catawessa Township in Northumberland County.

Sunbury, Monday, June 11.

A slave has a settlement in the township where his master resides,

THE pauper, *Samuel Williamson*, his wife and two children, were removed by an order of two Justices from the township of *Catawessa* to the township of *Forks;*

which is bound in the first instance to support him, though it may have a remedy over against the master or his estate. So in the case of a manumitted slave, who has not acquired a settlement elsewhere, after his manumission. Vide act of 29th *March* 1803, sec. 28. 5 *St. Laws* 536.

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and upon appeal to the Quarter Sessions of *Northumberland*, the order of removal was confirmed, and the proceedings brought to this court by *certiorari*.

It appeared upon the hearing, that the pauper was the property of *John Arndt*, of *Forks* township in *Northampton* county, who recorded him as his slave on the 23d of *October* 1780, stating him to be then of the age of thirty-five. After remaining for some time with *Arndt* as his slave, *Arndt* manumitted him, but no deed of his manumission was entered of record. Subsequent to this manumission, the pauper left *Forks*, and went to *Whitehall* township in the same county, where he married and had children; but he never gained a settlement in any place after he left *Forks*, nor did he ever after his marriage reside in *Forks*. He first became chargeable in the township of *Catawessa*.

Hall, for the overseers of *Forks*, argued against the order of removal, from the terms of the 6th section of the act of 1st *March* 1780, 1 *St. Laws* 838, which provides that the owner of any slave at the passing of that act shall be liable to the overseers of the township where such slave *shall become chargeable*, unless the owner, before the slave attains his 28th year, shall execute and record in the proper county, a deed of manumission. The law therefore contemplates in such a case as this, the liability in the first instance of the township where the slave becomes *chargeable*, and in the next place the *owner;* but it does not speak of settlement; it does not consider him as having any settlement, or as being able to obtain any; it merely provides for the case of his having an owner, and of his being chargeable *in fact* to some township or other, which embraces all the provisions that are necessary in the case of a pauper slave. Here the pauper became *chargeable* in *Catawessa*, and that township must indemnify itself by recourse to *Arndt* or his representatives; it cannot remove the pauper to *Forks*, because he was incapable of gaining a settlement there as a slave; and he never gained a settlement there after his manumission. Indented servants stand upon a different footing; the master is not bound to support them, and they are held to acquire a settlement where the master resides. But the law for the abo-

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lition of slavery compels the master to maintain the slave unless he manumits him before twenty-eight, and therefore no settlement is necessary. The poor laws do not say any thing of the settlement of slaves.

Duncan, in support of the order, contended that a slave has a settlement in the township where his master resides. The section of the act referred to shews that as a slave he can have a settlement somewhere, because in technical language, a township is not *chargeable* unless the pauper has a settlement there; unless he is *irremovable*. Where then can he have a settlement during his slavery, except where his owner resides? The case of an indented servant holds *à fortiori* as to a slave, because the latter is emphatically bound to his master. It is true that in the present case, the master must ultimately answer to the township, in consequence of the manumission's coming too late; but that does not affect the question, by what township is he to be supported in the first place. Suppose the master is insolvent, or absent from the state, must the pauper perish? *Williamson* had a settlement in *Forks*, and has never acquired one elsewhere. His children go with him, and so does his wife during marriage, even if she had a settlement of her own before. The opposite argument would fix the burden of maintaining the pauper, upon the first township through which he should happen to pass, after he ceased to be able to help himself.

TILGHMAN C. J. delivered the court's opinion.

Samuel Williamson, a pauper, and *Elizabeth* his wife, with their two children, were removed by an order of two justices of the peace of *Northumberland* county, from *Catawessa* township in the said county, to *Forks* township in the county of *Northampton*. The overseers of *Forks*, appealed to the Quarter Sessions of *Northumberland* county, who affirmed the order of removal, and their proceedings have been brought before this court by *certiorari*.

It appears that the pauper was the slave of *John Arndt*, deceased, of *Forks* township, who recorded him as such, of the age of thirty-five years, on the 23d of *October* 1780;

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OVERSEERS of Forks v. OVERSEERS of Catawessa.

agreeably to the provision of the act of 1st *March* 1780. After having remained the slave of *Arndt* for some time, the pauper was manumitted by deed not recorded. He afterwards left *Forks* township, married, had children, and has lived in various places, but gained no settlement. The counsel on both sides agree, that inasmuch as the pauper was not manumitted before the age of twenty-eight years, the estate of *Arndt* is liable for his maintenance, but the question is, which of the contending townships, must be at the charge of maintaining him in the first instance? It is not pretended that he has gained a settlement in *Catawessa;* but the overseers of *Forks* say, that he ought not to be thrown upon them, because he has gained no settlement there; in other words, he has a settlement *no where*, because the estate of *Arndt* is to maintain him. This argument appears to me to be not well founded. It does not appear by the record, that *Arndt* left any estate. But taking for granted that he did, the pauper is not to be left starving, until the representatives of *Arndt* can be compelled to maintain him. The question is, whether the township, in which the master of a slave resides, is not in the first instance bound to support him, in case he falls into distress? I apprehend it is. So I understand, has the law been taken, although it is not expressly declared so by any act of assembly. Indented servants gain a settlement in the place where they serve their time; and it would be a reflection on humanity to say, that a manumitted slave was intitled to no support in case of the insolvency of the master, or his neglect to support him. It is necessary that there should be some township to which he may look for immediate relief. This seems to have been always taken for granted, because by the old laws of the former province, the person manumitting a slave was obliged to give security to indemnify the township. I am therefore of opinion that the order of removal was legal, *Forks* township being in the first place chargeable with the pauper's maintenance. They may take their remedy against the estate of *Arndt*. It is unnecessary to say any thing about the wife and children, because they follow the settlement of the husband and father.

Order of the sessions confirmed.

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Sunbury, Monday, June 11.

Lessee of KEBLE *against* ARTHURS.

After two verdicts in favour of the same party, upon a simple matter of fact, it must be an extraordinary case in which the court will grant a new trial, though they have an undoubted right to do it; but it is otherwise where matter of law has been disregarded by the jury.

If a party knows of a survey having been made for another, and returned to the land office, without any improper conduct in the person obtaining it, it is against equity to permit the party having such knowledge to take advantage of those irregularities in the survey, over which the owner of it had no control.

THIS was an ejectment for a messuage and 155 acres of land in *Centre* county, tried before *Brackenridge* J. at a Circuit Court for *Centre* on the 21st *June* 1808. It had been previously tried before the Chief Justice, and a verdict found for the defendant, which was set aside.

By the report of his honour, the plaintiff claimed under a removed warrant in his own name, dated the 29th *July* 1773, surveyed on the 15th *August* 1783, and returned into office the 29th *June* 1784. The purchase money was paid on the 8th of *January* 1774.

The defendant claimed under an improvement commenced by one *Kelly* in 1793 or 1794, from whom it was purchased by *Arthurs*.

The case turned principally upon the validity of the plaintiff's survey, in relation to which the material evidence was this: By the return of survey, the plaintiff's south boundary was stated to be a number of *vacant hills;* in another part it called for land of *William Ramsey* as a boundary; the survey consisted in the whole of twelve lines or sides, of which six were the lines of prior surveys marked on the ground, but they were not called for in the return of survey; at least one line, however, peculiar to this survey, was marked on the ground, the same having been traced, and there was some evidence of others. Shortly after the defendant purchased of *Kelly*, he said that he knew *Keble's* claim well enough, but he did not care any thing about it; and there was evidence of conversations between *Arthurs* and the witnesses, (as well as the fact of *Arthurs'* residence near the ground five or six years,) before he bought, from which his knowledge of *Keble's* survey was inferrible. The south boundary however was not a ridge of hills, but it was about 40 poles from *Bald Eagle* creek, with a hill or two between; and *William Ramsey* had no survey in that quarter until the 19th *August* 1784, which was more than a year after the plaintiff's survey.

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The defendant's counsel contended, that as the plaintiff's warrant was removed, it gave no right until survey on the ground, return and acceptance; and that this survey was not valid, because it contained internal evidence of not having been made on the ground, there being no hills, nor any survey for *Ramsey*, although the plaintiff's survey called for both. Such a return would not therefore be notice to any one; because, the warrant not being any guide, and the survey calling for what did not exist, it would not be possible for any one to know that it applied to the land in dispute. If the lines of old surveys had been set forth in the return, that would have been sufficient; but they were not mentioned, and therefore they could not serve as notice. *Arthurs'* knowledge of the claim was not enough; but if it were, the conversations were fixed to a point of time subsequent to his purchase.

The plaintiff's counsel admitted that the survey, under the removed warrant, conferred no right until returned into office; but as soon as accepted there, it was notice to all the world. That the survey was made on the ground in part, was proved to demonstration by the marked trees which applied to no other survey; and it was unnecessary to run all the lines, because six of them were already run and marked for other surveys. It was of no consequence that this did not appear by the return of the plaintiff's survey; because the objection now was that the survey was not made on the ground; and the answer to that was, that surveys already made on the ground, were as to one half the lines applicable to this, and therefore need not be repeated. The survey was thus sufficiently distinct, and it was of course constructive notice to all; but there was, in addition to this, actual knowledge by the defendant; and where a party has actual notice of a survey made for a third person, it cannot be endured that he should set up an irregularity in the deputy surveyor, to justify his attempt to wrest the property from the legal and honest proprietor. If one line has been run, and that fact is known to the settler, it has been decided by President *Walker* that the settler acquires no right.

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His honour charged the jury as follows: Where a warrant is removed, and a survey actually made upon it, notice of the survey concludes the party who receives it, from alleging that the warrant was removed; and therefore the defendant in this case will be prevented from deriving any benefit from an objection of this sort, if he had notice of the survey. Actual notice is not necessary, for the return of survey gives such notice as the law respects equally with actual notice, namely, constructive notice.

But if the fact should turn out to be that no survey has been actually made, no return of a survey can be of any effect as to notice, because it will amount to no more than notice of a false return. If the officer has made a false return, the remedy must be against him or his representatives, and this is the remedy of the person interested in the return.

It has not been held by our courts that the survey must be made strictly according to the instructions of the surveyor general, or that it will be *void;* but I incline to think, that if it is not so made, it is voidable; that is, though good as between the grantor and grantee, it shall not affect third persons who have been led by the defect of so surveying, to lay out money, or to expend labour.

It will result to the question then in this case, was the survey actually made, and in substance according to the instructions of the surveyor general? The presumption is that it was, from the return of it. The surveyor's book of entries is conclusive evidence of the return, and of the time, though the want of this evidence would not be conclusive of its not being returned. It must lie therefore upon the defendant to establish the contrary, which is a negative position, and can be made out only by circumstances inconsistent with a survey.

The closing line in a survey is never run or marked; and I have never understood that any distinction has been made in this particular, between a removed warrant, and any other. But supposing it necessary that all the other lines be run and marked, the proof of one being marked is presumption to the jury that all the remainder have been marked, though not now to be found; and it is the province of the jury to weigh presumption, and infer from such evidence the conclusion that the officer has done what he was bound to do, and that

the survey has been legally made. It is matter of fact which I must leave with you. The principal circumstance, against the idea of a survey being made, is its calling for *Ramsey*, whose survey was not then made. You will weigh this in connexion with other circumstances.

The jury found for the defendant, and his honour refusing to grant a new trial, the plaintiff appealed to this court.

It was here argued by *Burnside* and *Watts* for the plaintiff, and by *Huston* and *Duncan* for the defendant, upon the same ground taken below, except that now the defendant's counsel pressed the circumstance of there being two successive verdicts for the defendant.

TILGHMAN C. J. The plaintiff, in this case, claims under a warrant and survey, and has paid all the purchase money. The defendant claims under a *settlement* made since the plaintiff's survey was returned, and contends that in fact no survey was ever made on the ground. It was submitted to the jury on the point, whether a survey was made or not; and they found for the *defendant*. We have had a report of the evidence from the judge, before whom the trial was had; and the verdict appears to have been so much against the weight of strong testimony, that I should not have had one moment's hesitation, about granting a new trial, were it not, that there have been two verdicts for the defendant. I have often said and now repeat, that after two verdicts on a simple matter of fact, it must be a very extraordinary case indeed, in which I could be induced to grant a new trial; because, although the court have an undoubted right to grant a third trial, yet it ought to be, in general, presumed, that where two juries have agreed, they must be in the right. In conformity to this principle, I should be for letting the present verdict stand, if I did not think that there was involved in the facts of this case, matter of law which has not been attended to by the jury. That some part of the plaintiff's survey was *made* and *marked* on the ground, was so incontestably proved, that I must suppose the jury had no doubt of it. I presume, they were of opinion, that the lines were not all run and marked, and therefore the survey was void. Now there was strong evidence, that the defendant, before he moved

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on the land, knew of a survey having been made for the plaintiff, and returned to the land office. If that was the case, and the plaintiff had been guilty of no improper conduct, it would be against equity, that the defendant should deprive him of his right, even though there was some irregularity in the survey, over which he had no control. I should wish that the cause might be reconsidered under this aspect, for I am very strongly of opinion, that the plaintiff has been injured. From the present arrangement of the courts, it is not probable that this matter will ever again come under our consideration. I make no doubt, but justice will ultimately prevail, and my conscience is well satisfied, by consigning the cause for another trial, to the impartial tribunal appointed to take cognisance of it.

YEATES J. concurred.

Judgment reversed, and
New trial awarded.

MILLER *against* MILLER.

3b 30
2s 304
4r 369

IN ERROR.

Sunbury, Monday, June 11.

The proceedings in cases of divorce, not being according to the course of the common law, a writ of error does not lie to the final sentence of the Common Pleas therein, but merely an appeal.

THIS was a writ of error to the Common Pleas of *Northumberland* county, to bring up the record and proceedings in a libel for a divorce *a mensa et thoro;* and a motion was now made to quash the writ, upon the ground that the act of 2d *April* 1804, which gave jurisdiction to the Common Pleas in cases of divorce, authorized an *appeal* from their final sentence, but not a writ of error; and the proceeding in these cases, not being according to the course of the common law, a writ of error could not be adopted, unless expressly sanctioned by statute.

Hall, for the defendant in error, relied upon *Groenvelt* v. *Burwell* (*a*), and the act of 21st *March* 1806, 7 *St. Laws* 569.

Duncan for the plaintiff in error.

(*a*) 1 *Salk.* 263. 1 *Ld. Ray.* 213. S. C.

TILGHMAN C. J. delivered the court's opinion. 1810.

MILLER v. MILLER.

This is a cause in which the court of Common Pleas of *Northumberland* county made a decree of divorce from bed and board, and alimony, in favour of the defendant in error. A motion has been made to quash the writ of error, because it is a case in which it is supposed that an appeal lies, but not a writ of error. Causes of divorce and alimony are, in general, not cognisable in common law courts. Jurisdiction was first given to the Supreme Court by the act of 19th *September* 1785, 2. *St. Laws* 384. Afterwards the same jurisdiction was extended to the courts of Common Pleas by the act of 2d *April* 1804, 7 *Car.* & *Bio.* 375; and this act provides, that after final sentence, either party may appeal to the Supreme Court. The proceedings, in suits of this kind, are not according to the course of the common law. On an appeal the matter is taken up *de novo*, and new evidence is admitted in the superior court, who may make such decree as under all circumstances appears proper. This could not be done on a writ of error. All that this court could do, in such a case, would be to reverse or affirm the judgment below, which would be extremely inconvenient; and for that reason the act of assembly gave an appeal. This being a jurisdiction of a peculiar nature vested in the common law courts by act of assembly, the mode of proceeding prescribed by the act, and no other mode, should be pursued. I am therefore of opinion that the writ of error should be quashed.

Writ of Error quashed.

Lessee of STEPHENS *against* BEAR and Others.

IN ERROR.

Sunbury, Monday, June 11.

THIS was a writ of error to the Common Pleas of *Lycoming* county.

An order of survey indorsed by the surveyor general upon the copy of an application, which had been entered in the secretary's office, is good evidence, although there is no proof that a copy of the application was ever entered upon the books of the surveyor general. The order is evidence that the application had been sent to the surveyor general by the secretary; and the owner of the location must not suffer by the omission of the former to place it on his books.

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Lessee of STEPHENS v. BEAR.

Upon the trial of the cause, the counsel for the plaintiff offered in evidence a copy of an application entered in the office of the secretary of the land office, dated the 3d *April* 1769, No. 903, certified by *David Kennedy*, secretary of the land office, under the seal of the office: and also a copy of the same application with an order of survey thereupon, directed by *John Lukens*, surveyor general, to *Charles Lukens* deputy surveyor of the district where the land lay, and now produced by the present deputy surveyor from the papers remaining in his office.

To this evidence the defendants' counsel objected, and the court overruled it, being of opinion that the surveyor general could not direct a survey to be made, except on the authority of some document existing in *his own* office, which in this case did not appear. The plaintiff tendered a bill of exceptions.

Evans for the plaintiff in error.

Huston for the defendant in error.

TILGHMAN C. J. This cause comes before us on a writ of error to the Common Pleas of *Lycoming* county; and the error assigned is, in the rejection of certain papers offered as evidence on the part of the plaintiff.

The point is clearly stated in the bill of exceptions. [Here the Chief Justice read the opinion of the court of Common Pleas.] There can be no doubt but the certified copy of the *application* was good evidence. The original application is always filed in the office of the secretary of the land office, and by the 3d section of the act of 9th *April* 1781, 1 *St. Laws* 891, copies of deeds, entries, and papers of the land office, "duly attested by the secretary or his deputy, under "hand and seal of office, shall be as good evidence as the ori-"ginal, by law might or could be." The doubt, as appears by the opinion of the president of the court of Common Pleas, arose, on the copy of the application, with the order of survey. This paper was rejected, because the application was not filed in the office of the surveyor general. In order to decide this point, it will be proper to advert to the mode of doing business in the land office. The application or *location* as it is sometimes called, is made and filed in the office of the

secretary of the land office, entered in the books of that office, numbered, and a copy sent to the office of the surveyor general, where it is also entered on the books of that office. The surveyor general has a copy made out in his office, and makes an order of survey on it, which is directed to the deputy surveyor of the district where the land lies. If by neglect or omission of the surveyor general, the application is not entered on his books, the owner of the application must not be injured thereby. It is certain that the application in this case was originally entered in the proper office. That is the foundation of the plaintiff's title. The order of survey follows of course. No part of the purchase money need be paid before the survey. The surveyor general is bound to give the order of survey, on receiving the application from the office of the secretary of the land office. The court of Common Pleas have taken for granted, that the application never was sent to the surveyor general, because there was no evidence of its being entered on the books of his office. But this order of survey, signed by the surveyor general, was satisfactory evidence that the application had been sent to him by the secretary of the land office. At least it was evidence proper to be laid before the jury. If there had been any fraud, or improper practice, it might have been shewn by the adverse party. This is not a new case. Orders of survey, remaining in the offices of the deputy surveyors, have been frequently admitted as evidence, without producing a copy of the application from the office of the surveyor general.

I am therefore of opinion that the papers rejected by the court of Common Pleas, ought to have been admitted as evidence, and that the judgment of that court should be reversed, and a *venire facias de novo* awarded.

Yeates J. and Brackenridge J. concurred.

Judgment reversed, and *Venire de Novo*.

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Sunbury, Monday, June 11.

If bail in error is not perfected within ten days after exception, not only may execution issue from the court below, but the defendant in error is intitled to a nonpros.

TAGGART *against* COOPER.

IN ERROR.

BY the minutes of the prothonotary in this case, which was a writ of error to the Common Pleas of *Northumberland*, it appeared that on the 24th *August* 1808, the recognisance of *William Murray* and *Matthew Irwin* was taken as bail in error, and notice given to the defendant in error. On the 27th the bail was excepted to, and on the 7th of *September*, at the instance of the attorney for the plaintiff in error, the time for perfecting bail was enlarged to the 12th; but on that day, the parties not appearing to perfect the bail, and the defendant's attorney proving notice of his exception, the prothonotary nonprossed the writ.

The question was whether the cause was in court, or in other words, whether the *nonpros* was regular.

D. Smith and *Watts* for the plaintiff in error, contended that the *nonpros* should not have been entered, but that the spirit of the rule of court was satisfied by permitting execution to issue in case good bail was not put in. A writ of error might have been taken out without bail, with every effect except as to staying execution; and omitting to perfect the bail left the plaintiff in error where he would have been, had no bail been entered.

Duncan contra, insisted that the language of rule 12 of this court was imperative upon the prothonotary to *nonpros* the writ, in case the bail was not perfected within ten days after exception, or in other words, to put the cause out of court; and the spirit of the rule was the same, as it intended to punish the plaintiff in error for entering sham bail.

PER CURIAM. On examining the rule of court we find it expressed in terms too clear to admit of a doubt. If the writ of error had been taken out without offering bail, the plaintiff below would have suffered no delay of execution. But he has been delayed by the improper conduct of the defendant below, in entering insufficient bail. This improper conduct de-

serves some punishment, and that is the reason why the rule of court directs a *nonpros* to be entered in such cases. The opinion of the court is that the *nonpros* was properly entered.

Lessee of WIRT *against* STEVENSON.

Sunbury, Monday, June 11.

APPEAL from the decision of *Brackenridge* J. at a Circuit Court for *Centre* in *June* 1808.

A return of survey is strong presumptive evidence that a regular survey has been made on the ground; and it lies upon the party objecting to it, to shew that it has not, by such circumstances as are inconsistent with a survey.

What is a reasonable description in a warrant.

The lessor of the plaintiff claimed under a warrant of the 1st *July* 1784 for "300 acres on the waters of *Cedar Spring*, "near or adjoining Mr. *Claypoole*,"—a survey on the 8th *November* 1785, and a patent on the 30th *January* 1787.

The defendant claimed under a settlement commenced in 1795.

The question was whether there had ever been a survey made for the lessor of the plaintiff. It was in evidence that the land in controversy did not adjoin *Claypoole*, but was at the distance of a mile or two from him. One of the witnesses swore that he had been employed to mark some of the lines on the ground when the survey was made, and that the surveyor had requested him to keep it secret, that he might afterwards himself be called to shew the lands. Some of the lines of the survey belonged to old surveys, and were therefore not marked over again; but several of the remaining lines were not to be traced on the ground, although the marked trees in one or two of those lines were blocked, and their age found to correspond with the date of the survey. Fires had frequently occurred in *Nittany* valley, where the land lay, and might have destroyed the marked trees. There was some evidence also that the defendant had actual notice of this survey, before he commenced his improvement.

The plaintiff's counsel contended that the warrant was reasonably descriptive of the land, and that the patent in such a case gave a good title, though no survey was made on the ground. That the return of survey was moreover presump-

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Lessee of WIRT v. STEVENSON.

tive evidence that a regular survey had been made, which had also been proved by the witness who assisted in marking the lines, and that the inability to trace all the lines was sufficiently accounted for. It lay upon the defendant to shew that a valid survey had not been made.

The counsel for the defendant answered that this was a vague warrant, the survey under which was not binding on third persons, unless completely made on the ground. They admitted that the patent was *prima facie* evidence of a survey, and threw the burden of proof upon the defendant; but there was no other mode of proving that a survey had not been made, than by shewing that the lines could not be found upon examination, which had been the case here. A single line, though incontestably proved, did not constitute a regular survey.

Brackenridge J. charged the jury as follows: This warrant seems to me to be descriptive to a reasonable intent. Unless where there are natural boundaries, or lines already surveyed, and called for, the description cannot be so perfectly precise, as not to be removable a breadth or half breadth. The breadth or half breadth of a warrant of 300 acres cannot be less than a mile or half mile. The warrant in this case would appear as precise as warrants usually are; it calls for land, speaking of a place of somewhat general description, but may be fairly considered as calling for land there or thereabouts.

The question in this case can be but one, has the survey been made by the officer in a legal manner, according to the forms, usages, and customs of the land office?

The survey is presumed to be made according to the return; for it is a maxim of reason and a principle of law, that all things shall be presumed to be properly and solemnly done, until the contrary appears. Now it does not lie upon the plaintiff to prove that the survey has been made; but upon the defendant to make it out by circumstances that it could not have been made; some one or more circumstances, with which the idea of a survey is inconsistent, or which render it strongly improbable that it was made. The only circumstance in this case, is the not finding all the lines marked. But this is rebutted, and the presumption of law which arises from the official return, fortified, by evidence of some of the lines being

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marked, and even by trees blocked, corresponding with the date of the survey.

It is not usual, say surveyors, to mark anew the lines of a boundary survey; nor is it lawful to do it, so as to deface or injure the former marks. This furnishes a reason which may account for some of the lines not being marked as of the plaintiff's survey.

It is remarkable that in this case, the land returned, or the greater part of it, is included within the boundaries of old surveys. The patent having issued for this, and before any right in the defendant had attached by improvement, is a matter of weight and consideration. It cannot certainly be said that no survey was made. It can at most be said, even supposing some of the lines not to have been originally marked, to be an imperfect survey; and the notice which the defendant would seem to have had, even of this imperfect survey, would distinguish his case very much from one who had no knowledge of a survey made at all.

The jury found for the defendant, and a motion for a new trial was overruled to bring the case before this court.

Burnside and *Watts* for plaintiff.

Duncan for defendant.

TILGHMAN C. J. The plaintiff in this cause moved for a new trial, because the verdict was against the evidence and against the charge of the court. The judge of the Circuit Court refused a new trial, not, as he has declared, that he approved of the verdict, but with a view that the case might be submitted to the consideration of this court.

The plaintiff claimed under a warrant dated 1st *July* 1784, reasonably descriptive of the land in dispute, on which a survey was made on the 8th *November* 1785, and a patent issued on the 30th *January* 1787. The defendant had no office right; but made title under a settlement made on the land, *after the date of the patent;* so that the only ground he had to stand on, was that in fact no survey was ever made for the plaintiff. It was very properly given in charge, by the Judge who tried the cause, that the return of a survey, was strong

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presumptive evidence, that a survey was made; and that it lay on the defendant to take off the force of that presumption. Where a cause turns very much on matter of fact, and especially where the court are of opinion, that a new trial should be granted, it is not our custom to make many remarks on the evidence. I shall therefore only say, that the presumption arising from the return of survey, was very much strengthened by positive testimony of lines run and an actual survey made on the ground. So much so, that I must say, I think the weight of evidence was greatly against the verdict. This being the case, and this appearing to have been the opinion of the Judge, before whom the cause was tried, I am of opinion that there should be a new trial.

YEATES J. concurred.

New trial awarded.

Sunbury, Tuesday, June 12.

CONNER *against* the COMMONWEALTH.

3b 38
7w 98

IN ERROR.

A warrant of arrest, issued upon common rumor and report of the party's guilt, though it recite that there was danger of his escaping before witnesses could be summoned to enable the judge to issue it upon oath, is illegal, and the constable to whom it is directed is not bound to execute it.

THE plaintiff in error was indicted at an Oyer and Terminer for *Northumberland* in *April* last, of the offence charged in the following bill:

"The grand inquest of the commonwealth of *Pennsylva-*
"*nia*, and for the body of the county of *Northumberland*, on
"their oaths and affirmations respectively do present, that on
"the thirteenth day of *December* in the year of our Lord one
"thousand eight hundred and nine, the honourable *Thomas*
"*Cooper* esquire then and yet being President Judge of the
"courts of Common Pleas and General Quarter Sessions of
"the peace in and for the eighth judiciary district of the
"commonwealth of *Pennsylvania*, and President Judge of
"the courts of Common Pleas, and General Quarter Ses-
"sions of the peace in and for the said county of *Northum-*
"*berland*, having authority to hear and determine divers fe-
"lonies, trespasses and other misdeeds committed in the

" said county, and having by virtue of his office authority to is-
" sue warrants, commitments and other process, on the day and
" year last aforesaid at the county aforesaid did make and is-
" sue his certain warrant under his hand and seal in due form
" of law, bearing date the said thirteenth day of *December* in
" the year eighteen hundred and nine, in the name of the
" commonwealth of *Pennsylvania*, directed to the constable
" of *Derry* township, or to any other constable of the county
" of *Northumberland*, setting forth, *that it appeared to him the*
" *said* Thomas Cooper FROM COMMON RUMOR AND REPORT,
" *that there was strong reason to suspect* Jacob Langs *of* Der-
" ry *township in* Northumberland *county, of having know-*
" *ingly uttered as true and genuine, certain false and forged*
" *notes purporting to be notes of the Farmers and Mechanics'*
" *Bank of* Philadelphia, *and that the said* Jacob Langs *was*
" *likely to depart from and quit the said county of* Northum-
" berland, *and retreat to parts unknown, before the witnesses*
" *to the said uttering could be duly summoned and appear be-*
" *fore him the said* Thomas Cooper, *in order to enable him to*
" *issue a warrant for the said* Jacob Langs *founded upon their*
" *testimony on oath*, therefore authorizing and requiring them
" without delay to bring before him the said *Thomas Cooper*
" the body of the said *Jacob Langs*, in order that he might
" be examined touching the premises, and therein be dealt
" with according to law; which said warrant, afterwards to
" wit on the sixteenth day of *December* in the year eighteen
" hundred and nine at the county aforesaid, to a certain *Jo-*
" *seph Conner*, then being constable of the township of *Green-*
" *wood*, in the said county, and also one of the constables of
" the said county of *Northumberland*, to be executed was de-
" livered, in obedience to which said warrant the said *Joseph*
" *Conner* on the day and year last aforesaid at the county
" aforesaid, proceeded to the dwelling house of the said *Ja-*
" *cob Langs* in the said county of *Northumberland*. And the
" inquest aforesaid on their oaths and affirmations aforesaid
" do further present, that the said *Joseph Conner* late of the
" said county yeoman, so being constable as aforesaid, and
" having in his hands the said warrant on the said sixteenth
" day of *December* in the year eighteen hundred and nine at
" the county aforesaid, to do his duty in that behalf totally

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CONNER v. COMMONWEALTH.

"did neglect, *and wilfully, obstinately, and contemptuously* "*did make default, and did omit and refuse to take the said* Ja- "cob Langs, *and bring him before the said* Thomas Cooper "*esquire, President Judge as aforesaid, as by the said war-* "*rant he was commanded, and by virtue of his said office of* "*constable, he should and ought to have done*, to the great hin- "drance of justice, in contempt of the laws, to the evil exam- "ple of all others in like case offending, and against the peace "and dignity of the commonwealth of *Pennsylvania*."

The plaintiff in error was convicted upon this bill, and the record of the indictment and sentence removed to this court by writ of error.

Hall for the plaintiff in error argued that the indictment did not set forth any offence, inasmuch as the warrant it recited was absolutely void upon its face, and the constable therefore not bound to execute it.

It was a warrant issued merely upon a common rumor of the party's guilt, without any oath whatever, and without any thing to supply the place of an oath, but a suggestion that the party might escape, before witnesses could be summoned to testify under oath.

This, he said, was in manifest violation of the constitution of the *United States*, and of the state of *Pennsylvania*, and repugnant to the first principles of civil liberty.

The *sixth* article of the amendments to the constitution of the *United States*, directs, that "the right of the people to be "secure in their persons, houses, papers and effects, against "unreasonable searches and seizures, shall not be violated; "*and no warrants shall issue, but upon probable cause sup-* "*ported by oath or affirmation*, and particularly describing "the place to be searched, and the persons or things to be "seized." And the *eighth* section of the ninth article of the constitution of *Pennsylvania*, provides, in nearly the same terms, "that the people shall be secure in their persons, "houses, papers and possessions, from unreasonable searches "and seizures; and that *no warrant* to search any place or "*to seize any person* or things, *shall issue*, without describing

"them as nearly as may be, nor *without probable cause sup-* "*ported by oath or affirmation.*"

The intention of these provisions seems to have been to guard against the very mischief that has occurred. It was obvious that cases might arise, where there would be apparent probable cause for issuing a warrant, and yet no one be found to confirm this probability by his oath. There might also arise cases where a prosecutor would be hardy enough to swear to a cause of prosecution, wholly without probability. The constitution intended to guard the liberty of the citizen, by requiring both the probable cause and the oath to justify the warrant, and the judge in this case acted upon at most but one of them. Common rumor might in some instances be considered as giving probability to a charge preferred upon oath by an individual, but it never can do more than this, and by itself it is nothing under the constitution. The Chief Justice proceeded upon this principle in the *Commonwealth* v. *Duane.* (*a*)

The suggestion that the party might escape, is not of the least importance; it might be made in any case, and thus turned into an instrument of the grossest oppression. The constitution prefers the escape of ten culprits, to the adoption of a practice which might lead to the imprisonment of one innocent man; it has said what shall be conditions precedent to the issuing of a warrant, and it is not competent to any magistrate to dispense with them. Even extreme cases would not confer the authority, since the constitution has not chosen to provide for them.

If then the warrant was void, it cannot be questioned that the plaintiff in error might refuse to execute it, and therefore the indictment contains no offence.

Duncan for the commonwealth, contended, that the warrant was legal, and even supposing it illegal, the constable having received it, was bound to execute it.

The constitution undoubtedly intended to secure the citizen from rash and unfounded arrests, and it therefore asserted as a general principle, that the solemnity of an oath

(*a*) 1 *Binn.* 102.

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should be added to the probability of the charge, in order to justify a seizure of the party accused. But it never intended that these precautions should become impediments in the way of justice, and confer impunity upon the guilty. Like every general principle then, there must be exceptions admitted to it, in order to prevent it from defeating itself. If a magistrate should himself witness the perpetration of a crime, and see that the criminal was about to escape; could the constitution have intended to forbid a warrant in such a case? If he should see a dead body, and be informed that the murderer was about to run off, must he have a formal oath and examination to ground the warrant? Surely there must be an implied exception of such cases out of the general rule, in order to make that rule a safe one for the community. Is there any doubt that in some cases necessity will justify a warrant without oath? Certainly there is not. The magistrate is the only judge of the necessity. He acts it is true under great responsibility, but still he, and he only, is the judge; it is not for the ministerial officer below him, to question the necessity, if it has been already settled by the magistrate. In addition to this, there cannot be stronger probable cause of prosecution, than a general belief of a party's guilt, nor greater necessity for dispensing with the oath, than what arises from the probability of the party's escape.

If a justice appears upon the face of the warrant to have *exceeded his jurisdiction*, that is, if the warrant is to arrest for an offence of which a justice has no jurisdiction, there is no doubt it is held that the constable is not bound to execute it. 3 *Hawk. bk.* 2, *ch.* 13, *sec.* 10. But that is a very different case from one, where the justice has undoubted jurisdiction, but has not granted the warrant upon a proper case. There the constable has no right to demur. He is bound to execute it, and may execute it with safety. If he may refuse because an oath has not been taken, with equal propriety may he refuse, where there has been an oath, but there has not been sufficient probable cause. The one is as essential as the other under the constitution, and they equally affect the validity of the warrant. The law does not intrust the officer with the decision of such questions. 3 *Hawk. bk.* 2, *ch.* 19, *sec.* 24. *ch.* 20, *sec.* 1, 2.

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TILGHMAN C. J. The plaintiff in error was indicted in the court of Oyer and Terminer of *Northumberland* county, for refusing to execute a warrant issued by *Thomas Cooper*, esq. president of the court of Common Pleas of the said county, for the arrest of a certain *Jacob Langs*, of the said county. The warrant was set forth at large in the indictment, and it appeared on the face of it, that it was issued without any previous oath or affirmation, on the following ground—"that "it appeared to the judge from *common report*, that there "was strong reason to suspect the said *Langs* of having "knowingly uttered as true and genuine, certain false and "forged notes, purporting to be notes of the Farmers and "Mechanics' bank of *Philadelphia*, and that the said *Langs* "was likely to depart from, and quit the county of *North-* "*umberland*, and retreat to parts unknown, before the wit- "nesses to said uttering could be duly summoned and ap- "pear before the said judge, to enable him to issue a war- "rant on their testimony on oath."

Judge *Cooper* acted with great candor and propriety in stating on the face of the warrant, that it was issued without oath, and there is no doubt but he was actuated solely by the desire of preventing the escape of a criminal. The question is whether this warrant does not appear to be illegal, from matter contained in the body of it? Of such matter the constable had a right to judge; and if it was illegal, he was not bound to execute it.

It is declared by the 8th section of the 9th article of the constitution of *Pennsylvania*, that no warrant shall be issued to seize any person, without probable cause supported by oath or affirmation. These expressions are very plain and very comprehensive. But it has been contended that the public safety requires that they should be subject to some exceptions; that in cases of necessity the oath may be dispensed with; and that the magistrate who issues the warrant, must be the judge of that necessity. It appears to me, that if this be the true construction, the provision in the constitution is a dead letter; because in every instance, the magistrate who issued the warrant, would say that he thought it a case of necessity. It is true, that by insisting on an oath, felons may sometimes escape. This must have been very

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well known to the framers of our constitution; but they thought it better that the guilty should sometimes escape, than that every individual should be subject to vexation and oppression. It is unnecessary to consider whether there is no possible case, in which a warrant may be issued without oath, a case for instance, in which a crime is committed under the eye of a magistrate; or whether in cases of great and imminent public danger, the *salus populi* will not form an exception to the general rule. When such cases arise it will be time enough to decide them. It is dangerous for a court to lay down general propositions, from which unforeseen consequences may be drawn. I shall therefore confine my opinion to the warrant set forth in the indictment. It was commonly reported that *Langs* was guilty of uttering counterfeit notes; this common report came to the ears of the judge, and on that he issued his warrant. The constitution says a warrant shall not be issued without oath, which is more than common report. If the constitution did not mean, that a man charged with or suspected of a particular offence, should not be arrested, unless some person swore either that he believed him to be guilty, or to some facts from which it might be reasonably inferred that he was guilty, then I confess I can see no meaning in it. As for the necessity set forth in the warrant, that is to say the probability that the criminal might escape, I cannot think that it is of that nature, which can form an exception to the constitution; even supposing, (which I do not affirm) that any necessity can form an exception. I am therefore of opinion, that the warrant was illegal, on the face of it, and the defendant not bound to execute it; consequently when he refused to execute it, he was guilty of no offence. But the refusal to execute the warrant is the only matter charged against the defendant in the indictment. Therefore, although the jury have convicted him of the matter charged, it does not appear on the record that he has been convicted of any crime. It follows, that the judgment of the court of Oyer and Terminer was erroneous and must be reversed.

YEATES J. of the same opinion.

BRACKENRIDGE J. of the same opinion.

Judgment reversed.

3b 45
5b 601
1sr 21
3sr144
10sr229
3pw474
3 450
119 324

OWEN *against* SHELHAMER.

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Sunbury, Thursday, June 14.

IN ERROR.

The proceedings in the Common Pleas, upon an appeal from a justice of the peace, are *de novo* only as to the declaration, pleadings, and evidence; but the cause of action must continue the same. And if it appears from the record of the Common Pleas, that any distinct cause of action has been blended with that upon which the justice decided, their judgment will be erroneous.

BY the record of the Common Pleas of *Northumberland*, which was removed to this court by writ of error, it appeared that *Shelhamer*, the plaintiff below, commenced this action before a justice of the peace to recover a debt of *thirteen pounds nine shillings*, for which sum, with six shillings and a penny costs, he obtained judgment. *Owen* appealed to the court of Common Pleas, where the plaintiff filed a declaration setting forth that he had committed to the defendant three militia certificates amounting in the whole to 22*l.* 3*s.* exclusive of interest, which the defendant had promised to receive and apply in a particular manner to the plaintiff's use; but that instead thereof he had *detained* the certificates, and *converted them to his own use*. The defendant suffered judgment to be signed for want of a plea, and upon a writ of inquiry, damages were assessed at *forty-six pounds one shilling and six pence*, for which sum and costs, final judgment was entered. He then moved to set aside this judgment upon the ground of its excess beyond the judgment of the justice, which was refused by the court.

Evans for the plaintiff in error, said, that the judgment was plainly erroneous for two reasons; *first*, because the declaration shewed that the cause of action before the Common Pleas was not the same which had been before the justice; and the transcript of the justice being the only warrant for the proceedings in the Pleas, that court had no authority to give judgment upon the appeal for any other cause of action. *Secondly*, that if the cause of action were the same, the amount recovered in the Common Pleas shewed that the sum in controversy exceeded the magistrate's jurisdiction, he having jurisdiction at the commencement of the suit only to the amount of 20*l.* So that either way the judgment must be reversed.

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Duncan for the defendant in error, answered that the court would make every reasonable intendment to support the judgment, as there was manifestly a just debt. The cause of action he said was the same throughout, and the term *debt* in the suit before the magistrate did not imply the contrary. The plaintiff recovered 13*l.* 9*s.* before him, because at that time the defendant had received only the interest upon the certificates; but before the writ of inquiry was executed, he had also received the principal, and hence the difference in the sums recovered. But if a different cause of action was declared upon, it was of no importance, because the proceedings were *de novo* in the Common Pleas, and had no reference to any occurrence before the magistrate. The act of assembly by which these proceedings were regulated, by requiring an appearance or bail, a declaration and plea, and every other step which is taken in an original suit, shews that all is *de novo;* act of *March* 1, 1745, sec. 9. 1 *St. Laws* 304.; and there is no mischief in it, because the defendant has full notice of the demand to be investigated, and if nothing is due, there cannot be a verdict and judgment.

Evans in reply said it had been expressly decided in *Moore* v. *Wait* (*a*) that the proceedings were not *de novo* in the Common Pleas, but that in substance though not in form, it was the propriety of the magistrate's judgment which was in discussion throughout.

TILGHMAN C. J. after stating the case delivered his opinion as follows:

It appears on the whole of the record, that the plaintiff prosecuted a different cause of action in the Common Pleas, from that which was decided by the justice. This he could not lawfully do.

It has been argued for the plaintiff that the judgment may be supported, because in the Common Pleas the proceedings are *de novo*, and that court is not limited to any sum in point of jurisdiction. But this argument is founded on a fallacy. The proceedings are *de novo* to a certain intent only; that is to say, the declaration and pleadings are new, and the court will hear new evidence; but the cause of action is the same.

(*a*) 1 *Binn.* 219.

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This is evident from the nature of things. The appeal is from the judgment of the justice, and the costs of suit before the justice await the event of the appeal. If a new cause of action is taken up in the Common Pleas, they do not proceed on the appeal, they do not decide the same cause which was decided by the justice, and the judgment of the justice may be reversed, when it was perfectly right. I mean, that it may be in effect reversed, although in point of form there is no reversal. This is so manifestly improper, that it requires no authority to shew its illegality. It happens however, that the principle has been decided by this court in the case of *Moore* v. *Wait*, reported in 1 *Binney* 219, and cited on the argument. There, judgment was arrested in the court of Common Pleas, because it appeared that the justice had given judgment for a sum beyond his jurisdiction; but if the matter had been taken up as a *new action* in the Common Pleas, it would have been immaterial for what sum the justice had given judgment.

I am of opinion therefore that the judgment of the Common Pleas was erroneous, and must be reversed.

YEATES J. The single question in the case is reduced to this, whether the judgment of the court of Common Pleas, grounded on matters whereof the justice of peace had no jurisdiction, can be supported upon an appeal from the decision of such justice. The justice's jurisdiction at the time of the judgment rendered by him, was limited to 20*l.* but the Common Pleas have rendered a judgment for 46*l.* 1*s.* 6*d.* The declaration states that the plaintiff below committed three militia certificates of different sums, but amounting together to 22*l.* exclusive of interest due thereon, to the defendant, and that the defendant engaged to receive it, and apply it to the use of the plaintiff, but that instead thereof he detained the certificates and converted them to his own use; so that he has blended special assumpsit, detinue, and trover in one count. It is said by the counsel of defendant in error, that the suit before the justice was for the interest money alone; but that it being afterwards discovered that both principal and interest had come to the hands of *Owen*, he had been pro-

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ceeded against for the whole amount in the Common Pleas. Can this then be legally done on an appeal?

It is a settled rule, that the cause of action must exist at the commencement of the suit, and cannot be varied by subsequent circumstances. If the time of payment on a note sued before a justice has not arrived, the premature institution of the action before him will not be cured by the note's falling due, before the declaration filed in the Common Pleas on an appeal. Or suppose a creditor has two notes of fifty dollars each, one of which only became due before the justice issued his precept, he cannot proceed for both notes in the Common Pleas, if the last day of payment should arrive before he declares on the appeal. In either case, he would change his ground of action, which must accrue before he brings his suit. It seems incongruous, that a man should recover 10*l.* before the justice, but when the defendant appeals, the plaintiff should protect himself on a ground of action interdicted to the justice, but cognisable in the Common Pleas. Here *Shelhamer* should have contented himself on the appeal with his cause of action before the justice, and if he had other causes of suit against *Owen*, he should have instituted a new action for recovery thereon. I entirely agree with the principle laid down in 1 *Binn.* 219, *Moore* v. *Waite*, that nothing can be recovered upon the appeal, which could not be recovered before the justice, except as to the intermediate interest. I may feel regret for the momentary defeat of a just claim; but I am bound to declare that the proceedings in the Common Pleas cannot be supported, and that the judgment must be reversed.

BRACKENRIDGE J. The demand before the justice is *debt*, thirteen pounds nine shillings. A justice of the peace cannot be expected to distinguish technically the cause of action, whether debt, case, or otherwise. It cannot therefore be inferred that the cause of action before the justice was debt, technically speaking; it may have been *assumpsit* in case of some kind. On appeal to the court of Common Pleas, the declaration here is *assumpsit* in case. The case set forth is interest to be drawn upon a certain certificate of 10*l.* 13*s.* 6*d.*; and two other certificates; one of 6*l.* 15*s.* 0*d.* another of 4*l.*

14*s.* 6*d.* making 11*l.* 9*s.* 6*d.* with the interest on the first mentioned certificate, to what amount is not stated. It cannot be inferred from the accounts stated in this declaration that the cause of action was not the same with that before the justice; but rather that it was the same; *the defendant in his appeal to the court of Common Pleas not having alleged a departure, by demurrer to it.* The judgment being by default, there could not have been a motion in arrest of judgment. But, on the motion to set aside the judgment and proceedings, which appears to have been made, a different cause of action declared upon is not alleged as a ground of the motion; but that the judgment taken by the justice could inure only for the amount adjudged by the justice, to wit, thirteen pounds nine shillings.

Was it error in the court to overrule this motion, and to sanction the finding of a jury for a larger sum? *Non constat* from a larger sum being found, that the ground of demand was different from that before the justice. For it may be said, that had the plaintiff alleged his whole demand before the justice, and had judgment been rendered accordingly, the amount might have been the same; as before the justice the plaintiff may have *contracted* his demand, so as to bring it within the jurisdiction of the justice, to avoid delay, or for other reasons.

But setting aside the alleged error of a different cause of action, which does not seem to me to appear, is judgment for a greater sum, error? In the court to which the appeal is made, the whole demand may have been gone for, which as to part had been waived before the justice. A larger sum may go to shew a different cause of action, but can have no other effect. Yet it does not prove the cause of action different. For a declaration on a penal bond in a sum exceeding the jurisdiction of the justice would set forth the penalty, not the sum reduced by a set off, which brought it within the jurisdiction of the justice. Judgment on the appeal may be for a greater sum than before the justice, comprehending the interest that has accrued in the mean time; and I do not see why a larger sum than this, found by a jury and judgment upon it, should be error. I have never been satisfied with what is said to be a principle, but does not seem founded on good reason, that damages cannot be recovered beyond the sum laid in the declaration. It seems strange to me that the sum laid should be con-

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strued material, so that what is proved, if it be more, may not be recovered. The jury look only at the cause of action and the evidence, and not at the quantum of damages alleged; and why should the court look at this in giving judgment? I may say the same here. Of what importance is it, what was recovered before the justice? If more damages were proved on the appeal than were recovered before the justice, it is a proof that more was due than had been originally demanded, and nothing else.

Judgment reversed.

Sunbury, Thursday, June 14.

ROSS *against* EVANS, Administrator of WALLIS.

Although a deputy surveyor is not intitled by law to the full fees of a survey, unless all the lines are run and marked, yet if an imperfect survey has been accepted by the owner without objection, and the full fees paid to the deputy surveyor, the latter cannot claim to diminish the usual compensation of the surveyor who performed the work under him, by objecting to the manner in which the work was done.

THIS was an action of *indebitatus assumpsit* to recover from the defendant's intestate, who was a deputy surveyor, the amount of the plaintiff's demand for surveying at the instance and for the account of the intestate, in 1792, 3, and 4.

The declaration contained three counts: the first, *indebitatus assumpsit* for work done; the second, for money paid by the plaintiff for the use of the intestate; and the third, for money had and received by the intestate to the use of the plaintiff. The action was brought to *December* term 1798, and was tried before *Brackenridge* J. at a Circuit Court for *Lycoming*, in *May* 1807.

Upon the trial it was proved that the plaintiff had executed a number of surveys for Mr. *Wallis* in the usual manner of executing company surveys, that is, by running the exterior lines of the body. These surveys had been accepted by the proprietors, and the full fees paid to Mr. *Wallis*. In other cases of the like kind, no exception appeared ever to have been taken to the surveys, but there was no positive evidence of the full fees having been paid to *Wallis*. No evidence was given of any contract by *Wallis* to pay the plaintiff a particular sum, but it was proved to have been his practice to allow his agents one third of his full official fees; and the plaintiff's account was formed upon this basis.

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The exceptions taken to the plaintiff's recovering below, were: 1. His delay to institute the suit until after *Wallis's* death, which happened in 1795. 2. His omission to shew warrants for all the surveys he had made, and also a regular deputation from *Wallis*, without which he had no authority to make a survey. 3. The invalidity of the surveys he had made, by running merely a part of the lines, which, if *Wallis* had not already received full fees, would prevent his representatives from receiving them, and if he had received them, would render his representatives liable to pay them back.

His honour charged the jury as to the *first* point, that although there was some reason for examining with strictness, a claim which was not brought forward during the party's life, yet it was a mere circumstance, to be explained by other circumstances in the case. *Secondly*, That although regularly in such cases the agent should be able to produce a formal deputation, yet it had not been the practice to give it, and therefore the jury were to collect from all the evidence whether the plaintiff had been employed by *Wallis*. And *thirdly* that although there never ought to have been a survey made, without marking the trees, or setting up stones or posts, yet the *usage* had been where there were several warrants, and the owner did not request otherwise, to run the general outline, or to take the adjoining surveys, and plot a survey from those lines. That an owner was not bound to take such a survey, but that if he did, he was bound to pay for it. That the case in which it had been determined that full fees were not recoverable, was where the owner had been dissatisfied, and demanded an actual marking of the boundaries. But that as between the deputy and his agent the case was not the same, where such a survey had been made, the owner satisfied, the survey adopted by the principal, and the fees received by him. It was not reasonable that such deputy should object to the act of his agent in such a case; it was not competent to him to object to the work, if he received full fees for it, of which the jury would judge.

The jury found for the plaintiff nearly his entire demand, and his honour refused to set aside the verdict.

Upon an appeal by the defendant to this court, the motion for a new trial was argued on his behalf by *Watts* and *Dun-*

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can, who in support of their argument below upon the third point, relied upon *Woods* v. *Ingersoll.* (*a*) They at the same time made a new objection to the plaintiff's recovery in this suit, on the ground that the evidence applied to a count for a *quantum meruit* and not to *indebitatus assumpsit.*

Hall and *Huston* for the plaintiff.

Tilghman C. J. The plaintiff's action is for surveying work done at the request of *J. Wallis* deceased, who was a deputy surveyor. The declaration contained a count in *indebitatus assumpsit* for work &c. done by the plaintiff; another for money paid by the plaintiff for the use of the defendant; and a third for money had and received by the defendant for the use of the plaintiff. In the argument in this court, the defendant's counsel have urged some objections which were not made at the trial, to the relevancy of the evidence as applied to the declaration. But I am not disposed after a verdict to pay much regard to exceptions not relied on at the trial, and no way bearing on the merits of the cause. On a motion for a new trial, the great question is, whether the justice of the case has been attained?

There is one exception, and but one which appears to have any weight, and that I shall proceed to consider. The law directs, that all the lines of a survey should be run and marked on the ground. The defendant says, that the plaintiff did not run all the lines of the surveys made by him, and therefore he ought not to have the full price of a survey regularly made. It should be here remarked that it was proved that *Wallis* had allowed, to other persons employed by him, one third of his official fees, but there was no evidence of any particular agreement between him and the plaintiff. It was held by this court in the case of *Woods* v. *Ingersoll* &c. that a surveyor was not intitled to his full fees, where the survey was imperfectly made. And if this had been a suit by *Wallis* against any of the persons for whom the surveys were made, there is no doubt but his account would have been docked, unless it had appeared, that the manner of making the surveys was known and consented to. The plaintiff contends that where the lines

(*a*) 1 *Binn.* 146.

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were not run, the parties interested knew of it and were satisfied; that *Wallis* accepted the work, as it was done, and took the benefit of it, by charging and receiving his full official fees; and there was proof, that he had received his full fees for a considerable number of surveys. If in fact *Wallis* received the full benefit of the plaintiff's work, the objection which has been taken, would come with an ill grace from the mouth of his administrator. I can perceive no error in law, in the charge of the judge who tried this cause. It was substantially to this effect: That if the owners of the surveys were satisfied, the surveys adopted by the principal, and the full fees received by him, he ought not to object to the manner of doing the work. Whether this was the case he left to the jury. It has considerable weight with me, that the judge declares himself perfectly satisfied with the verdict. The view of the evidence which this court can take, is at best but imperfect. Many circumstances are omitted by the most accurate note taker. And of the credibility of the witnesses we know nothing. There are one or two features of this case, which strike me as unfavourable to a new trial. Fifteen years have elapsed since this work was done. It must be presumed that in most instances the surveys have been returned; and we know that the returns are never made till the fees are paid. The defendant produced no proof whatever, that in any instance the owners of the survey refused to pay the fees; and I think that he was unreasonable in calling on the plaintiff to produce proof that warrants were issued in all the cases, in which surveys had been made, when the documents of the plaintiff's work were necessarily put into the hands of Mr. *Wallis*, and the defendant might easily have known whether warrants were issued or not. He stood on the *defensive*, and produced no evidence. The plaintiff has been kept a long time out of his money, and the jury allowed him no interest. I think it most probable, that in many cases the surveys were not completely made. But still, considering all circumstances, there is great reason to suppose that *Wallis* has reaped the fruits of them. I am not satisfied that the defendant has been wronged by the verdict. That being the case, the jury having decided on the

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merits, and finding no misdirection in point of law, I must give my opinion that the judgment of the Circuit Court be affirmed.

Yeates J. concurred.

Judgment affirmed.

3d 54
5s 225
2r 417
3r 444
4w 457
4w 462
9w 189
2ws 63
6ws 21
6ws 38
34 31
71 261

Sunbury, Thursday, June 14.

Lessee of Lazarus and Others *against* Bryson

As between a debtor or his representatives and the sheriff, who sells the debtor's land by execution, a purchase by the sheriff, or by any one in trust for the sheriff, without the debtor's consent, is void; but if the debtor consented to such a purchase, his representatives cannot impeach it; and even if he did not know or consent, the sale cannot be disturbed to the prejudice of a subsequent *bona fide* purchaser without notice.

There is no difference between a sheriff and a common trustee, as to the right of either to become the purchaser at a sale of the property under his control, or as to the effect of such a purchase upon subsequent purchasers without notice.

THIS was an appeal from the decision of his honour Judge *Brackenridge* at a Circuit Court for *Northumberland* in *May* 1807.

The lessors of the plaintiff were the children and heirs of *Frederick Lazarus* deceased, and in that character claimed the land in dispute.

The defendant made title under a judgment against *Frederick Lazarus* in favour of *John Field* and son. The land was sold under a *venditioni exponas* upon this judgment, and conveyed by *Robert Irwin* the sheriff to *Jesse Moore* the purchaser, by deed dated the 3d of *May* 1800. In the autumn of the same year *Frederick Lazarus* died. On the 28th of *March* 1801 *Moore* conveyed the land to *Robert Irwin* for 298*l.* the same price at which he had bought it at sheriff's sale; and on the 21st *September* 1801, *Irwin* conveyed to the defendant for 856*l.* 0*s.* 7*d.*

The plaintiff endeavoured to impeach this title by offering evidence to shew that *Moore* was a nominal purchaser, and that he had bought in trust for the sheriff, or in trust as to all the profits beyond the purchase money, to divide the same between *Lazarus*, the sheriff, and himself. Upon this subject a great deal of contradictory testimony was given; but there was nothing to bring home to the defendant a knowledge of any collusion between the sheriff, *Moore*, and *Lazarus*, unless it could be inferred from *Moore's* being known as the clerk of the sheriff, and from his conveying the land to him for the price he had himself given for it.

His honour charged the jury, that the evidence greatly preponderated in favour of there having been a connexion, be-

tween *Lazarus*, the sheriff, and *Moore*, as to the profits, and that in that case he was clearly of opinion that the children of *Lazarus*, who were in point of law, *Lazarus* himself, could not impeach the sale. But that if *Lazarus* was not privy to the interest of the sheriff, still, as the defendant was a *bona fide* purchaser for a valuable consideration, and without notice of any secret agreement between *Moore* and the sheriff, he could not be affected by it. His honour therefore instructed the jury to find for the defendant.

The jury however found for the plaintiff, and Judge *Brackenridge* overruled a motion for a new trial, in order that the defendant might bring the point before this court by appeal.

Kidd and *Duncan* for the defendant argued for a new trial upon the ground that the verdict was against law, and the explicit charge of the court.

If *Lazarus* was to participate with the sheriff in *Moore's* purchase, then the purchase was indefeasible by him or his heir, notwithstanding it might have impugned a general principle of law. He must be considered in the light of a promoter of the purchase, as constructively encouraging the defendant to buy, and therefore concluded in equity from objecting to the title. *Sugden* 480, 476. *Berrisford* v. *Milward.* (*a*)

But if *Lazarus* was ignorant, the defendant was a *bona fide* purchaser for a valuable consideration, and without notice, and therefore could not be affected by any misconduct of the sheriff, nor by any trust which such misconduct may have raised in favour of *Lazarus*, as between him and the sheriff. The title of the defendant has the greatest respect shewn to it in equity. Neither heir, nor orphan, nor creditor, is assisted in Chancery to impeach such a title. Instead of disarming him, that court will protect him, unless the claimant makes out a clear case of notice. *Sugden* 476. *Jerrard* v. *Saunders* (*b*), *Collet* v. *De Gols* (*c*), *Wilker* v. *Bodington* (*d*); it has always been careful not to impeach such purchasers by presumptive notice. *Hitchcox* v. *Sedgwick* (*e*). The question uniformly is, had the purchaser notice of the original fraud or trust? and if he had not, he holds his estate discharged from it. 2 *Fonbl.* 148. *Graff* v. *Smith's administrators* (*f*).

(*a*) 2 *Atk.* 49.
(*b*) 2 *Ves. jr.* 458.
(*c*) *Cas. tem. Talb.* 67.
(*d*) 2 *Vern.* 599.
(*e*) 2 *Vern.* 159.
(*f*) 1 *Dall.* 485.

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The plaintiff at all events is not at present prepared to contest the defendant's title; he is bound in the first instance to pay all that the sheriff paid, and all subsequent improvements. *Sugden* 402, 407.

Evans and *Hall*, for the plaintiff, answered that if this could be considered only as the common case of trustee and *cestui que trust*, they would not have troubled the court with an argument. But they thought it was to be governed by different principles.

It was a case they said, in which a highly favoured class of persons was interested, the creditors of *Lazarus*, who would obtain the benefit of the verdict, if it should be confirmed; and the claim was therefore not to be regarded with prejudice, as though the heir of *Lazarus* were impeaching the act of his ancestor for his own benefit. But whatever might be the favour with which the case was to be regarded, it came to a question of law, whether the sale by the sheriff passed any estate; and they argued that it did not for two reasons:

In the first place, the sheriff must be considered as having been himself the purchaser, the interposition of *Moore's* name being nothing. Now the sheriff was incompetent to buy at his own sale. He wanted legal capacity to become a purchaser, and the sale was a nullity. Had an application been made to the court, they would have prevented an acknowledgment of the deed, because it could pass nothing; and it is to be deemed equally invalid now, for the same reason. The sheriff is not to be considered as a trustee who buys the land which he himself held in trust. Consent might in such a case give the trustee ability to buy. He is rendered incapable only for the sake of the *cestui que trust*, and if the latter consents, the impediment is removed. But the sheriff is the agent of the law, and of creditors. The consent of the debtor is of no effect in communicating a power, which the law has inhibited for the sake of others beside the debtor, and therefore the case is to be considered as though no consent had been given. The sale would then have been void, and the deed would have passed nothing. This clears the controversy from the question of notice.

But in the next place, the evidence presented the question

of fraud between these parties to diminish the product of the sale, and the verdict of the jury has decided that there was fraud. This, according to *The Lessee of Weitzell* v. *Fry* (*a*), also vitiated the sale. Fraud indeed vitiates every transaction; and the only thing necessary to affect the defendant's title with it, was notice. Now whatever is sufficient to put the purchaser upon inquiry, is good notice in equity; *Sugden* 498, 499; and certainly the well known connexion between *Moore* and the sheriff, the identity of the consideration for the deed from the sheriff to *Moore* and from *Moore* back to the sheriff, with the large increase of it upon conveying to the defendant a few months afterwards, were sufficient for this purpose.

TILGHMAN C. J. The lessors of the plaintiff are the children and heirs of *Frederick Lazarus* deceased, by descent from whom they claim the land in dispute. The defendant makes title under a judgment for *John Field* and son against the said *Frederick Lazarus*. The land was sold under a *vend. exp.* and conveyed to *Jesse Moore* esquire the purchaser, by deed from *Robert Irwin* sheriff of the county of *Northumberland*, on the 3d of *May* 1800. In the autumn of the same year *Frederick Lazarus* died. *Jesse Moore* conveyed the land to *Robert Irwin* on the 28th of *March* 1801 for 298*l.* the same price at which he bought it, and *Irwin* conveyed it to the defendant on the 21st of *September* 1801, for 856*l.* 0*s.* 7*d.*

It was strongly urged at the trial, that all these conveyances were void, because *Moore* was the purchaser at the sheriff's sale, on a secret trust for the sheriff himself. On the other hand, it was denied that *Moore* purchased in trust for the sheriff; and it was contended that if he did, yet the defendant, being a purchaser for valuable consideration without notice, should hold the land against the children, or even against the creditors of *Frederick Lazarus*.

The evidence was various, and in some respects contradictory; but it may be inferred from the whole testimony, either that *Moore* purchased on his own account, or on an agreement between *Lazarus*, the sheriff, and himself, that the land should

(*a*) 4 *Dall.* 218.

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be resold by him, and the profit arising on the resale, equally divided among all three; or in trust for the sheriff in whole or in part. I will consider the case under those three points of view.

1. If *Moore* purchased on his *own* account, there can be no question but the defendant's title is good; because a sale made by *Moore* to the sheriff, from whom the defendant purchased, would be a transaction perfectly fair and legal.

2. But suppose there was an agreement that *Moore* should sell the land, and divide the profits equally between *Lazarus*, the sheriff, and himself. This would have been an improper combination; but with what face could *Lazarus*, or his children claiming under him, impeach the sale to the defendant, a purchaser for valuable consideration, unconnected with them, and ignorant of their secret contract? In such case, a sale to a third person would be necessary to effect their purpose; and yet the plaintiffs come forward to defeat the agreement of their ancestor. Instead of avoiding the sale, they ought to consider it as valid, and call on *Irwin* for one third of the profits.

3. The only serious question which can arise in this cause, is upon the supposition, that *Moore* purchased either wholly in trust for the sheriff, or in trust for the sheriff as to an undivided moiety. In such case, if the dispute was between the children of *Lazarus* and the sheriff, I should have no hesitation in saying that the plaintiffs would be intitled to recover; because so far as the sheriff himself was concerned, or so far as *Moore* his partner was concerned, I should consider the sale as void. The law has intrusted the sheriff with the important charge of selling the property of debtors on executions; and it will not endure that the same person should be both seller and purchaser. Not but that in many cases, the sale might in fact be fair and honourable; but from a principle of the soundest policy, from the temptation to dishonest practices, to which the officer would be exposed, and from the difficulty of detecting him, where he acted fraudulently. I consider this principle as settled, and indeed it has not been questioned by the counsel for the defendant. But the case of the defendant stands on a very different footing from that of the sheriff. There is no proof, that he had *actual* notice of the

sheriff being in any manner concerned in *Moore's* purchase. Nor do I think that the circumstance of *Moore* having made a conveyance to the sheriff, can be considered as legal or constructive notice. It might very well have happened, that the sheriff purchased of *Moore*, without having been any way concerned in the purchase made by *Moore* at the public sale. It is a circumstance however, which the jury might take into consideration, on a question whether the defendant had actual notice.

The plaintiff's counsel have endeavoured to distinguish this case from that of a trustee, who sells land in pursuance of his trust, and becomes the purchaser at his own sale. The sheriff, say they, was never trusted by *Lazarus*, but derived his authority from the *law*. I cannot say, that I feel the force of this distinction. With respect to a purchase made by a sheriff, or a trustee, the law is confessed to be the same. In both cases, the sale would be avoided. And with a view to third persons, who are purchasers for valuable consideration without notice, I see no reason for any difference. If the land is resold for a profit, the injured party in either case may have his remedy. The *cestui que trust* looks to his trustee. The debtor, whose land has been sold by execution, may look to the sheriff. There is as much reason to protect the innocent purchaser in one case, as in the other. The case of *Weitzell et al.* v. *Fry* was cited; 4 *Dall.* 218; but it is not to the purpose. It will be found, that this point did not occur in that case. If the matter is considered on grounds of public convenience, we shall find no cause for a distinction. It is for the interest of the public, that land should sell for its fair value, and that honest purchasers, who have been guilty of no imprudence, should not be disturbed. Land which had been once exposed to sale by the sheriff, would be of little value, if subsequent purchasers could be affected by secret transactions, of which they had no knowledge. The consequence would be, that land would bring very little at a sheriff's sale, and thus the debtors, the very persons whom it is proposed to benefit by the distinction now set up, would be its victims.

This was the opinion of the judge, before whom the cause was tried in the Circuit Court, and I fully agree with him. The verdict was directly in the face of his charge in matter

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of *law*. It is true he refused a new trial, but with a view, as he has declared, that the law might be settled in this court. I am therefore of opinion, that a new trial should be granted.

YEATES J. concurred.

BRACKENRIDGE J. On the trial of this cause I assumed it as a fact that the sale was made not only with the privity and consent of *Lazarus*, the judgment debtor, but that *Lazarus* was interested in the purchase, and was to share in the profits that might be made by it. This would appear from the testimony of Col. *Bull*, that *Lazarus* said he would give up his title papers to any clever fellow that would purchase, and from his giving up the title papers to *Moore* the nominal purchaser; and also from his declaration to *Simon Snyder*, that he was interested in the profits to be made out of the sale, which goes towards supporting what was said by the sheriff himself to *Snyder* before, that *Lazarus* was to have 100*l.* of the profits. The dissatisfaction of *Lazarus* with the sheriff after the sale, from his saying to *Snyder* that if he had expected such treatment he would have withheld his papers, would seem to carry with it evidence that some misunderstanding had arisen about dividing the profits.

Had the sheriff himself been a bidder at the sale, had the crier knocked down the estate to the sheriff, it would have been the same as the sheriff knocking down to himself; for the crier is the sheriff as to the act of crying and knocking down, being his agent. But a deed by *Robert Irwin* sheriff to *Robert Irwin* could not be made; and on the face of it would be void. The official capacity could not be separated from the personal, in the same act. The consent of the debtor could not make it good. The sheriff could not sell, nor execute a conveyance to himself.

But this inconsistency in the nature of the thing does not exist where the property is struck down to a third person, and the deed executed to him, even though the sheriff is the real purchaser. But the policy of the law will interfere here, and render the act voidable according to circumstances. If it is with the knowledge of the debtor whose estate is sold, and the sale is honest as to him, I do not know that *he ought to be suf-*

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fered to avoid it. I believe if the fact came to the knowledge of the court before the acknowledgment of the deed, they would be justifiable in refusing to take it. But on an ejectment by the debtor himself, as is the case here, it would seem to me he ought not to be heard. The act which he wishes to avoid, was an immorality in which he participated. It is in this sense that the maxim of the civil law is to be understood. *Nemo allegans turpitudinem suam audiendus est.* His allegation is, I had the title; it was sold with my privity *in fraudem legis;* nominally to a third person, but in fact to the sheriff himself; and therefore I avoid it.

But shall he be heard alleging this in avoidance of the deed, after a conveyance under the sale by the sheriff to an innocent purchaser? It is not alleged that the defendant in this case had any notice that the sale was but nominally to *Moore*, and really to the sheriff; unless *such notice* as seeing the conveyance from *Moore* to the sheriff made a year afterwards, can be supposed to have given him. This conveyance might be made on other considerations than the sheriff being the real purchaser. He might have taken the word of the purchaser for the purchase money and have acknowledged the deed without having actually received it; or the purchaser might have alleged unfairness in the sheriff in his representation to induce a purchase at a high value for the interest of the debtor; and to save himself from loss in the one case or blame in the other, the sheriff might be willing to take the property himself; or he might afterwards, *bona fide*, and without having had any participation in the first sale, become a purchaser. It could not therefore necessarily be inferred from the conveyances themselves, that the sheriff was the real purchaser at the sale by the sheriff. All question of notice therefore to the present defendant, is out of the case. It is constructive notice only that can be alleged; and this, in my opinion, is not constructive notice to him. But even supposing him to have had notice of the circumstances under which this sale was made, and that the sheriff had been the real purchaser, he could be in no worse situation than the sheriff and the debtor himself, and they could not recover possession against their own act; *in pari delicto melior est conditio possidentis.*

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Had the creditor under whose judgment the estate was sold, or any other judgment creditor, come forward to have the sale set aside before deed acknowledged or after, but before a transfer to an innocent purchaser, I have no doubt it could have been set aside; but I think that after a transfer it could not; and the judgment creditor in the execution would be left to his remedy against the sheriff, for the remainder of his debt, if the property sold did not bring the whole. Or if it did bring the whole, other judgment creditors might have a remedy against him, for the fraud upon them as far as he made profit by it, as for money had and received to their use. But I do not think that a person wholly innocent, and having in appearance a conveyance sanctioned by the formalities of the law, ought to be affected. I went so far at the trial as to direct the jury to find for the defendant; but what might be the case on a resale by the judgment creditors, and an ejectment brought on that, I did not say. I am now of opinion that under the circumstances of this case, the law will protect the defendant against the judgment creditor or judgment creditors, subsequent to the judgment on which the estate was sold. These are the deductions of my own reason on weighing this case on grounds of moral obligation, and pursuing it in its bearings, on grounds of legal policy. But on looking into the books where they touch on this subject, directly or by analogy, I find confirmation. I have consulted chiefly a late writer, *Sugden's Law of Vendors*, and the authorities to which he refers. Under the head of persons incapable of purchasing, *chap.* 14, *p.* 391, he lays it down broad enough as a general proposition, that trustees, agents, auctioneers &c. *except under restrictions*, are incapable of purchasing. The characters are inconsistent. *Emptor emit quam minimo potest; venditor vendit quam maximo potest.* The purchase is not permitted in any case *however honest the circumstances;* the general interests of justice requiring it to be destroyed in every instance, as no court is equal to the examination and ascertainment of the truth in much the greater number of cases.

But in the late case of *Coles* v. *Trecothick*, 9 *Vez. jun.* 234, the trustee's father, for whom the trustee in this case acted as agent, purchased an estate; and as the *cestui que trust* had full knowledge of the value, and consented to the sale, and no

fraud was proved, a performance was decreed, though the *cestui que trust* had since been offered 5000*l.* more for the estate.

In *Welpdale* v. *Cokeson*, 1 *Vez.* 9., 5 *Vez. jr.* 682 *n.*, where a trustee for creditors purchased part of the estate himself, lord *Hardwicke* said, if a majority of the creditors agreed to allow it, he should not be afraid of making a precedent. Lord *Eldon* doubted the authority of this case, as to the consent of the majority, *unless all consented*, which implies that the consent of all would do; such a sale therefore would not be considered *absolutely* void.

In *Crow* v. *Ballard*, 6 *Vez. jr.* 628., 3 *Bro. Ch. C.* 117, where an agent for the sale of a legacy purchased it himself in the name of a trustee, lord *Thurlow* said that alone was sufficient to set aside the transaction. It was impossible he said at any rate, that the person employed to sell, could be permitted to buy. Even if this was done with *the knowledge of the party selling*, *it could not be supported.* But the rule as laid down by lord *Thurlow*, says the writer, clearly cannot be supported. It may be doubted whether he ever laid down such a rule, as no mention is made of it in the report of the same case, by that able and accurate reporter *Vez. jun. vol.* i. *p.* 215. For it must not be understood that a trustee cannot buy from his *cestui que trust;* the rule is that he cannot buy from himself. 10 *Vez.* 426. If therefore the *cestui que trust* clearly discharges the trustee from the trust, and considers him as an indifferent person, there is no rule which says he may not purchase of him, although the court will look with a very jealous eye on a transaction of that nature; and, to be supported, it must clearly appear that the purchaser at the time of the purchase, had shaken off his confidential character, by the consent of the *cestui que trust* freely given after full information, and bargained for the right to purchase. 8 *Vez. jun.* 553. And the same circumstances that will authorize a trustee to contract for himself, will enable him to purchase as the agent of another. 9 *Vez. jun.* 248. The writer goes on in page 401, to consider what remedy the *cestui que trust* has, where his trustee has purchased the trust estate in a manner not authorized by the rules of court. He says " *if the trustee has not sold the estate*, " the *cestui que trust* may insist on the purchase being

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"avoided, and may reclaim his estate; for it need not be "shewn that the trustee has made an advantage." 6 *Vez. jun.* 627., 4 *Vez. jun.* 411., 10 *Vez. jun.* 423., 8 *Vez. jun.* 385—393.

If the trustee has actually sold the estate, the *cestui que trust* may compel the trustee to pay him what he may have received above the original purchase money. 2 *Bro. C. C.* 400., 5 *Vez. jun.* 423.

Where a trustee buys the trust estate at a fair price, the sale is seldom called in question unless he afterwards sell it to advantage; and then the *cestui que trust* is of course only desirous that the money gained by the trustee on the resale, should be paid to him.

These authorities can apply only on considering the sheriff as a trustee, or an agent to execute a trust. It behoves us therefore to inquire, for whom is he a trustee or agent. He is the trustee or agent of the law for all the purposes for which he is employed, and all having an interest in the sale of the estate. These are the judgment debtor himself, and the judgment creditor or creditors, as well as the purchaser. It is implied in the trust and enjoined in the agency, that the most will be made of the property to be sold, and this for the benefit of the debtor, as of all who are intitled in law or equity to look to this fund for payment. It is a fraud upon one or all of these, if the most is not made of it; and the sale is voidable at the instance of such of them as are injured by an under sale; but not, I conceive, at the instance of such as have been parties to the transaction for the purpose of defrauding the rest, *unless it be for the sake of others.* And in the case of purchases without notice I would not think it voidable by either, but the remedy to be against the sheriff; and this would seem to be the doctrine of Chancery, from the authorities cited by the same writer, *Sugden* 401, where he says that a purchaser of a trust estate from a trustee who had previously sold to himself, is seldom implicated in the suit; but it seems clear that a person purchasing with *notice* of the previous transaction, would be liable to the same *equity* as the trustee was subject to. 10 *Vez. jun.* 123. By implication a person purchasing without notice could not be affected. A different rule it is said, says the writer, would blow up like

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gunpowder this branch of equitable jurisdiction. And I might add that a different rule would blow up all sheriffs' sales; for it would be impossible for a purchaser at a sheriff's sale to know whether there might not be some unknown collusion with the debtor, by the officer, and which even after a deed acknowledged to him might avoid the sale as fraudulent *ab initio;* but more especially, if this was allowed against a purchaser of a purchaser at a sheriff's sale, who had no knowledge of the fraud.

These were my impressions on the trial as far as I could make up my mind from a knowledge of general principles, or from my own reason, viewing the case in its consequences, and on grounds of legal policy, founded in public convenience or private justice. But I will not say that I did or could communicate these impressions to the jury in their full extent. I can only say that I had the substance of them in my mind, and did direct the jury in favour of the defendant; and it was matter of surprise to me that they found otherwise. The motion for a new trial was overruled *pro forma* only, and to give the opportunity of taking the opinion of the court in bank; that is to say, from my overruling the motion it is not to be inferred, that I would have refused a new trial, had I not thought this the speediest way of having the opinion of the court on the points of law that arise in the case. I now give these as my sentiments; not as giving an opinion in this court, but as reporting my opinion on the case, in order to repel the implication from my not granting a new trial, that I approved of the verdict; or that it was agreeable to the sentiments I delivered to the jury, so far at least as respects the plaintiffs in the ejectment tried; for I consider the representative of *Lazarus*, as *Lazarus* himself, and in no better equity to recover.

New trial awarded.

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Sunbury, Friday, June 15.

Lessee of BOND and others *against* STROUP and others.

A shifted application is not a commencement of title, until return of the survey made under it, except as against a person who has actual notice of the survey; and although the proprietor of a younger survey may have actual notice of the survey upon the shifted application, yet if there is laches in the return of this survey, and in the mean time the younger survey is sold to a *bona fide* purchaser without actual notice, he will hold the land.

THIS was an appeal from the decision of *Brackenridge* J. who refused to set aside a verdict which the jury found for the defendants, at a Circuit Court for *Mifflin* in *June* 1808.

The case was argued in this court by *Duncan* for the plaintiffs, and by *Huston* and *Watts* for the defendants.

TILGHMAN C. J. The plaintiff claims under an application of the 25th *June* 1767 in the name of *William Perry Brady*, on which a survey was made on the 12th *September* 1768, and returned to the office of the surveyor general on the 28th *September* 1772. On the 13th *January* 1775, *Brady* conveyed to *George Campbell*, *Daniel Clymer*, *Phineas Bond*, and *Andrew Robeson*. A patent was issued on the 2d *May* 1789, and by sundry conveyances unnecessary to mention, the title to this tract became vested in the plaintiff. It is admitted by the plaintiff, that *John Brady* was the real owner of the application, although entered in the name of his son *W. P. Brady* an infant.

The defendants claim under two applications dated the 1st *August* 1766, one in the name of *John Wilson*, junior, the other in the name of *William Raye*. The leading application (*William Raye's*) is thus described. "To include a spring "leading into *Juniata*, and adjoining lands of *John Wilson* "jun. including an improvement made in 1757." *John Wilson* jun. is, "to the northward of the east branch of *Little* "*Juniata*, adjoining land claimed by *William Raye*." These applications are part of twenty five, which were entered at the same time by *Samuel Wallis*, deceased, and they are now claimed as part of *Wallis's* estate. It is admitted that the land in dispute lies on the waters of *Bald Eagle* creek, which runs into the western branch of *Susquehanna*. The defendants contend that surveys were made on these applications

in *June* 1767. There is no positive proof, at what time the survey on *John Wilson* jun's. was returned, but a patent issued to *S. Wallis* on the 24th *May* 1782. The survey on *William Raye* was returned on the 29th *July* 1783, and a patent issued to *Samuel Wallis* on the 31st *October* 1783. The plaintiff's survey includes part of both the tracts, to which the defendants make title in the manner above mentioned.

A great deal of evidence was given in this cause, and several points both of law and fact were much contested. It has been argued with great ingenuity and force on both sides. My opinion will be given on one point only, and therefore I think it unnecessary to say any thing of the others. The defendants' surveys were made on shifted applications, because *William Raye*, on which *John Wilson* jun. depends, calls for a spring leading into *Juniata*, and including an improvement. This is not a vague description; the *spring* and the *improvement* are in their nature fixed to a certain place. The waters of *Juniata* are called for, but the survey is made on the waters of the west branch of *Susquehanna*. It is therefore in a different place from that described in the application. It has been long settled, that these shifted applications have no commencement of title, till the survey is returned; because before the return the proprietary officers have no notice of such survey, and are therefore at liberty to grant the land to any other person. But it has been also settled, that a person who has actual notice of the survey, before the return, shall be bound by such notice. Now to apply this principle to the case before the court. The plaintiff has the youngest application, and in that respect, her title is inferior to the defendants'. But the plaintiff's survey having been first returned, a preference was thereby gained. To obviate this difficulty, the defendants allege that *John Brady* had actual notice of the defendants' survey, at the time the application was entered. This was matter of fact for the decision of the jury; and if the cause turned upon that, and the jury thought that *Brady* had notice, there would be an end of the matter. But the plaintiff's case is different from *Brady's*. Let us consider how the matter will stand, supposing *Brady* had notice, and was bound by it. *Wallis* neglected to have his surveys returned till after *January* 1775, when those

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persons, under whom the plaintiff claims, purchased of *Brady*. Here was a most unreasonable delay, a lying by for upwards of seven years. In *Duncan's Lessee* v. *Wallis*, where plaintiff and defendant had applications both dated the 3d *April* 1769, it was held that the defendant, though his application was prior and descriptive of the land in controversy, should be postponed to the plaintiff, because the defendant had no survey made prior to *March* 1773, at which time the plaintiff obtained her patent. That case was much stronger than the present, because there, the defendant's application called for the land in dispute. The same principle has been adopted in many other cases, and it is so reasonable, that its justice cannot be doubted. It is of the utmost consequence to preserve uniformity of decision, otherwise there will be no certainty in property.

The defendants' counsel have endeavoured to evade the force of this principle, by saying that *Campbell* &c. who purchased of *Brady* in 1775, were in fact the persons for whose use *Brady* entered the application originally, and that as he was only their agent, they must be affected by the notice which he received. The law on this point would be clearly with the defendants, if the fact supported them. But I can see nothing in the evidence, which warrants this assertion, nor was the fact so conceived by the judge before whom the cause was tried. The defendants say too, that the survey on the application in the name of *John Wilson* jun. was returned prior to the return of the plaintiff's survey. I am by no means satisfied of that from the evidence, as reported to us. Indeed as the defendants' title commences on the return of survey, I think it was incumbent on them to prove the time of return more clearly than they have done. But even if it was so, the return of *William Raye* was not made, as is confessed, before 1783. So that upon the principles I have laid down, the verdict should have been for the plaintiff for at least what was contained in *Raye's* tract. The judge's charge inclined, in point of law, in favour of the plaintiff, because she, or those under whom she claimed, were purchasers for valuable considerations without notice, after an unreasonable delay of *Samuel Wallis*, in procuring a return of his surveys.

That is precisely the light in which it strikes me. I am therefore of opinion that a new trial should be granted.

YEATES J. concurred.

New trial awarded.

3b 69
3r 397
8 419
27 240

Lessee of ZEBACH and others *against* SMITH and another.

Sunbury, Friday, June 15.

THIS was an ejectment for 330 acres of land, which was tried before the Chief Justice at *Sunbury* in *June* last.

The testator appointed *A, B* and *C*, his executors, and gave them power to sell his land by the following clause—"*The executors, namely, A, B and C, shall be impowered to sell my land, &c. and to give a good right.* When my *debts* are paid, if any thing should remain, my wife shall keep, &c." Two of the executors refused to act.

Held that the third had authority to sell.

The lessors of the plaintiff claimed as heirs at law of *Bartholomew Zebach.*

The defendants claimed under a sale by *George Wolf* one of the executors of *Zebach*; and the questions were 1. Whether *Wolf* had a right to sell. 2. Whether the sale was fair or fraudulent. 3. Whether the defendants could be affected by the fraud.

In relation to the *first* question, the evidence was that *Bartholomew Zebach*, by his will dated the 11th *December* 1775, appointed *George Wolf*, *Leonard Miller* and *Godfrey Rohrer*, his executors, whose authority over the land in dispute, depended upon the following clause:—"The executors, namely "*George Wolf*, *Leonard Miller* and *Godfrey Rohrer*, shall be "impowered to sell my land in *Shamokin*, on *Penn's* creek, "in the old purchase, and to give a good right. When my "*debts* are paid, if any thing should remain, my wife shall "keep two cows &c." *Miller* and *Rohrer* renounced on the 26th *December* 1775, and on the 15th *May* 1781, *Wolf* conveyed to *George* and *Philip Vanheada*, under whom the defendants claim, reciting a sale at public auction in pursuance of *Zebach's* will.

The evidence on the *second* point, was that one of the *Vanheadas* was the son-in-law of *Wolf*, that the land was sold for only 150*l.* continental money, equal to about 5*l.* specie,

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and that there was personal property sufficient to discharge the testator's debts.

On the *third* point, there was no evidence but the recitals in the deed to the *Vanheadas;* and they related only to the source from which *Wolf* derived his power, the public auction, and the consideration of 150*l*, which was not stated to be continental.

The Chief Justice charged the jury, that in general a power given to three persons to sell, could not be executed by less than three. But there were exceptions. It had been agreed by the counsel on both sides, that if *Zebach* had authorized his executors to sell, without naming them in that part of the will where the power was given, *one* might sell, although the others renounced. This however, in sound reason, seemed the same as if he had named them; for there could be no doubt that if he had used the word executors alone, he must have had in his mind the persons whom in another part of his will he had named executors. It had also been agreed, that if this power of sale was connected with the *office* of executors, one might sell, if the others refused. Now the power to sell was by this will attached to the office of executors, because the testator had said, "*my executors*, namely *A*, *B*, *C*, &c. shall be impowered to sell," and immediately afterwards said, "*after my debts paid*," the remainder of his estate should be disposed of in a certain manner. The proceeds of sale were thus made liable to be administered by the executors in payment of debts, though the will did not say so expressly. It must have been the testator's meaning. It was the law of *Pennsylvania*. The case was stronger in this state in favour of a sale by one executor than in *England;* because in that country lands were not assets after they were sold, unless the will made them so; but *here* they were. The Chief Justice upon the whole inclined to the opinion that the executor in this case had a power to sell; but he said he should be well pleased, if on this point the opinion of the court in bank should be taken.

The *second* question his honour left to the jury; and on the *third* instructed them, that the defendants could not be affected by the fraud if any, because they were in the situation of purchasers for valuable consideration without notice.

The jury found for the defendants; and a motion for a new trial being overruled, the plaintiff appealed.

The case was argued in this court by *Watts* for the plaintiff, and by *Hall* and *Duncan* for the defendants.

For the plaintiff it was contended, upon the only material question, the first, that the power given by the will was a naked power, to the individuals named, which at common law could not be executed by less than the whole number, and which was not in any manner provided for by the statute of 21 *Hen.* 8. *c.* 4. Instead of the testator's having indicated by the names of the individuals the office they were to perform, as is sometimes done, he has indicated by the name of office the individuals to whom he chose to communicate the power; "My executors *namely A B, C D*, and *E F.*" That is, not my executors, however the number may be affected by death or renunciation, but my executors *nominatim*, shall have this power, and not any less number than the whole. The opinion that they take *virtute officii* in such a case, though countenanced by Mr. *Hargrave* in his edition of *Coke Littleton*, 113 *a. note* 2, is in opposition to the doctrine of *Lord Coke*, who seems to be supported by Mr. *Powell* in his treatise on devises, *p.* 302. They take a power *virtute officii*, which they are to execute in furtherance of their official duty; but if they are named by their proper names, says Mr. *Powell*, it annexes a personal authority, and appropriates the trust to them as private persons. *Pow. on Dev.* 307. It was with a view to such a case as the present that the legislature of this state passed the act of 12th *March* 1800. 4 *St. Laws* 593.

On the part of the defendants it was said, that Mr. *Hargrave's* argument, that where a power to sell was given to persons *nominatim* in the character of executors, it should be considered as annexed to the executors *ratione officii*, and so exercisable by the survivor, or by one if the others renounced, was intitled to great consideration, from the mere weight of his respectable name. But there was no necessity to rely upon it here, because it was clear from the manner in which the testator contemplated the proceeds of sale to go, and also from the direction the law of this state would give them, namely the payment of debts, that it was a power which

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thy took *virtute officii*. The case of *Howell* v. *Barnes*, relied upon by Mr. *Powell*, is a clear authority for us, for he endeavours to take it out of the general rule asserted by Mr. *Hargrave*, by shewing that the persons named were to apply the produce of the sale *officially*, that is, as executors; and certainly the executors of *Zebach* were to do the same here. This appropriation of the proceeds has always been considered as obviating the objection of naked powers. *Swinb.* 406. 408. It gives in fact an interest to the executors, who are bound to pay the debts, if the requisite funds have been provided by the testator.

YEATES J. Three questions have been made upon the present will.

1st. The first, which was chiefly relied on, was, that *George Wolf*, the acting executor of the will of *Bartholomew Zebach*, had no power to sell the lands in question, under the terms of the will.

The will is very short, and so far as respects the point under consideration, is in the following words. "The *execu-* "*tors*, namely *George Wolf*, *Leonard Miller*, and *Godfrey* "*Rohrer*, shall be impowered to sell my land in *Shamokin* on "*Penn's* creek, in the old purchase, and to give a good right. "When my *debts* are paid, if any thing should remain, my "wife shall keep two cows &c."

It has been objected by the plaintiffs' counsel, that the executors had but a bare naked power to sell, without any interest, and the authority being given to them in the *plural* number, a single executor was not justified in making sale, under the plain expressions in the will. The opinion of *Powell* in his *Treatise on Devises*, *p.* 302, has been opposed to the note of *Hargrave* in his note (2) to *Co. Lit.* 113 *a*, and a preference given to the doctrine of the former. It has been further urged, that the act of assembly of 12th *March* 1800 was made with a view of amending the supposed defects in the law. This act is in some insances *remedial*, but in others merely *declaratory;* and it does not appear from the expressions used by the legislature, that it was intended to be remedial as to the point now to be decided. It seems unnecessary to determine in this case, whether the doctrine advoca-

ted by Mr. *Hargrave* or Mr. *Powell* is intitled to most respect; but I cannot avoid observing that the distinction contended for by Mr. *Powell* partakes of more refinement than solid reason. It is admitted on all hands, that if the authority to sell was given to executors *virtute officii*, a surviving executor might sell; and an acting executor is put in the same state as a surviving executor, upon the renunciation of the other executors, by the words of the statute of 21 *H.* 8. *c.* 4. Now here the *executors* by their name of office are expressly impowered to sell; and it seems of little moment that they are afterwards named individually. The authority is given to them in their character of executors, and for the purpose of payment of debts, as appears by the succeeding clause in the will, an object which is highly favoured in law. I see no ground of either law or sound reason, which obliges the court to decide, that the sale made by *Wolf* was without authority.

2d. Fraud is imputed to *Wolf* in selling the land in *October* 1779 to a son-in-law, for continental money, at a very inadequate price, when the country was almost depopulated, and no immediate necessity urged the sale. It would be unreasonable to judge of the conduct of *Wolf* from subsequent events. Many people thought very differently of the bills of credit issued by the *United States* during the revolutionary war. *Æsop's* fable of the *Old Hound* reminds us of the injustice of censuring those, who placed confidence in the money emitted by congress. It was of essential service during the war with *Great Britain*, though we may deplore its effects on individual interests. Several witnesses have sworn to the fairness of the rule, and though the lands on *Penn's* creek have risen rapidly in price since, we ought not to condemn the conduct of *Wolf*, if it flowed from an honest, though uninformed and mistaken judgment.

3d. It has been further asserted, that *Smith* the present holder, is not intitled to the character of a *bona fide* purchaser without notice, he having had implied notice from the recitals in his deed, and having taken a covenant of general warranty. It is true, these recitals put him on inquiry respecting the facts set forth therein; but did not give him constructive notice of extrinsic facts, as that the land had been sold at an

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inadequate price, by the acting executor to a son-in-law, for continental money, or that the affairs of the testator did not require such a sale. The question of fraud was fairly submitted to the jury under all the circumstances, who by their verdict have negatived the privity of the purchaser in the supposed fraud. The lessors of the plaintiff have acquiesced in the sale from *October* 1779 until *August* term 1801, when this suit was brought; and upon the whole I have no hesitation in saying that the judgment of the Circuit Court should be affirmed.

BRACKENRIDGE J. expressed his concurrence.

Judgment affirmed.

END OF JUNE TERM 1810.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

Western District. September Term, 1810.

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Pittsburg, Friday, September 7.

Lessee of JACKSON and others *against* BURNS.

A *British antenatus* is incapable of taking lands by descent within the state of *Pennsylvania*.

THIS was an appeal from the judgment of the Circuit Court of *Allegheny* county.

It was an ejectment for a tract of land situated in that district of country formerly claimed by the state of *Virginia*, and afterwards ceded to *Pennsylvania* by agreement between the two states.

The lessors of the plaintiff claimed as heirs of *William Jackson* who commenced a settlement in the spring of the year 1774 upon the land in dispute, by clearing and fencing a part and planting corn in it, having previously, in partnership with *Hugh Sterling* who afterwards conveyed his share to *Jackson*, purchased the right of a certain *Sampson Beaver*. In the autumn of 1774 *William Jackson* went to *Ireland*, with an intention as he said to return the next spring and settle the land; but he did not return until the year 1784. He left it during his absence under the care of *Sterling* and *Beaver*, with a request that they would hire a person to keep possession, and carry on the improvement. In the spring of 1776 *Beaver* hired a man to maul rails. In the same year the defendant and a man of the name of *Deaver* came on the land. The defendant prevailed upon *Beaver* to give him up a bill

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of sale from *Sterling* to *Jackson* which the latter had left in his possession, and a forged assignment was made upon it, by which the title was conveyed to the defendant. *Deaver* and the defendant appeared in opposition to each other before the *Virginia* commissioners, the defendant claiming the *whole* land under the bill of sale; but he was defeated by *Sterling*, who advocated the cause of *Jackson*, and told the commissioners that a forgery had been committed. The commissioners decided in favour of *Jackson*, and granted a certificate in his favour dated 8th *March* 1780, at which time he was in *Ireland*. A survey of 400 acres was made on this certificate on the 4th *January* 1786. *William Jackson* died a short time after his return to the *United States* in 1784. One of the lessors of the plaintiff, *John Jackson*, the elder brother and heir at law of *William*, *was born in* Ireland *before the American revolution*, *and was never in the* United States.

The defendant continued on the land from the time he first settled there in 1776, until the trial, and had made considerable improvements. On the 22d *April* 1785 he took out a warrant under *Pennsylvania*, on which he afterwards had a survey made. In *September* 1788 there was a hearing before the board of property between him and *Hugh Sterling*, the administrator of *William Jackson;* and the board decided in favour of the defendant, to whom a patent issued on the 6th *September* 1788.

From this evidence two questions arose: 1. Whether *William Jackson* derived a good title to the land, from his settlement, and the certificate of the *Virginia* commissioners. 2. If he did, could that title descend to his brother who was born before the revolution, and had never been in the *United States*.

The second question was reserved for consideration in bank. On the first the verdict was for the plaintiff, and a motion to set it aside, being overruled, the defendant appealed.

The cause was argued at *September* term 1807 by *Woods* for the plaintiff, and by *Ross* and *Addison* for the defendant.

On the *first* question the arguments for the defendant were as follows: By the law of *Virginia*, *William Jackson* acquired no right by any thing done before he went to *Ireland* in 1774;

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the act of the 3d *May* 1779, *Revised Code* 90, being the first which recognised a title by improvement, and the decision in *Jones* v. *Williams* (*a*) being express, that *no right whatever* could be acquired in this way, in lands formerly belonging to the crown, until that act passed. This law, it is true, allowed to all persons who had *bona fide* settled themselves and their families on waste and unappropriated lands before the 1st *Jan.* 1778, 400 acres for every family; but this was a bounty intended for *inhabitants* only, as appears by the 8th section, and not for absentees. But whatever right this law might have given to those who claimed the benefit of it before it was altered, a law to explain and amend it, which was passed the 4th *Oct.* 1779, *Revised Code* 113, introduced an absolute bar to *William Jackson's* claim, by directing that no certificate of right to lands for actual settlement, or of preemption right, should thereafter be granted by the commissioners, unless the person intitled thereto had taken the oath of fidelity to *Virginia*, or should take it before the commissioners; except in the case of the *inhabitants* of the territory in dispute with *Pennsylvania*, who should be intitled to a certificate upon taking the oath of fidelity to the *United States*. *Jackson* was not an inhabitant. He never resided on the land. He abandoned his improvement. He never took the oath of fidelity. He was in fact an alien. He elected to leave this country at the beginning of the war, and did not return until the end of it. He chose his side as he had a right to do. The defendant ran all the risk and hazard of the war, and is intitled to the reward of it. It is no objection to the defendant's title, that the commissioners of *Virginia* preferred *Jackson's*. They exceeded their authority, and their act was void. If *Jackson's* agent deceived them as to his situation, it was a fraud; if the commissioners knew the truth of his situation, they violated the law. In either case, the certificate and the survey under it were of no effect.

On the *reserved* point it was argued, that by the declaration of independence all the attributes of sovereignty were attached to the states, and all persons out of them became aliens. It was the creation of a government by common consent, to which all who were parties to the compact paid a vo-

(*a*) 1 *Washington* 230.

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luntary allegiance, but which neither claimed nor was intitled to allegiance from any one residing without the *United States*. Persons standing in this relation of alienage, have not, by either the law of nature or nations, a right to claim lands by devise or descent. Rights of this kind are wholly dependent upon the positive law of the country where the estate lies; 1 *Rutherford's Inst.* 109, 110. 118, 119; and in almost every quarter of the world, for the wisest reasons, aliens have been excluded from the enjoyment of them. There are then but two inquiries in relation to the asserted right of *John Jackson* under positive law. 1. Whether by the common law of *England*, which extends to this state, he is capable of taking by descent. 2. Whether any such right is secured to him by treaty between the *United States* and *Great Britain*.

1. The common law allows an alien to take by purchase, though he cannot hold; but it precludes him from taking by inheritance. *Co. Litt.* 2. *a. Calvin's Case* (*a*). 2 *Black. Comm.* 249. *Co. Litt.* 8. 1 *Woodeson* 374. He can take nothing by act of law, for want of inheritable blood; and it is wholly immaterial in what relation he stands to the individual who died seised. The son of an alien cannot inherit to his uncle who was a subject. *Collingwood* v. *Pace* (*b*). The son of an alien father and *English* mother, cannot inherit from his mother, if he was born out of the king's allegiance. *Doe* v. *Jones* (*c*). He is wholly cut off by the common law from all connexion with the soil of the country to which he is alien, except in a few instances, for the benefit of trade, or of the sovereign upon office found; and this common law is the law of this state, and the rule in the present case. 1 *St. Laws* 722, act of 28th *January* 1777. *Morris's Lessee* v. *Vanderen* (*d*). What then is an alien by the common law? A person born out of the allegiance of the king. In relation to our own government, a person born out of the allegiance of the *United States*, or considering the recent origin of this government, a person who never owed allegiance to the *United States*. Surely *John Jackson* stands in this situation. In order to intitle a person to inherit, he ought in reason to owe allegiance to the sovereign of the country where the inheritance lies, *at the time of*

(*a*) 7 *Rep.* 16.
(*b*) 1 *Ventr.* 413.
(*c*) 4 *D. & E.* 300.
(*d*) 1 *Dall.* 67.

the descent. The right flowing from the allegiance, they should be contemporaneous. But although this may not be required by the common law, yet it is at least essential that at some period the heir and the ancestor should have owed a common allegiance to that sovereign. The courts of *Great Britain* hold this to be sufficient, and upon this ground, it is said, allow *American antenati* to inherit lands in *England*, they having once owed allegiance to the king of *England*. Their courts however require this, and it is the least that can be required. There is otherwise no common tie between the heir and the ancestor. Now it is clear that *John Jackson* never owed allegiance to the *United States*, and therefore it is the same case, as though he were a native of *France*. The whole argument for the right of *John Jackson*, is founded upon a *dictum* of the judges in *Calvin's Case* (*a*), that although the kingdoms of *Scotland* and *England* should thereafter by descent be divided and governed by several kings, yet all those born under one natural obedience while the realms were united under one sovereign, should remain natural born subjects, and not aliens. If this means natural born subjects of the *British* crown, it does not affect the present case, because it applies merely to *American antenati;* if it means natural born subjects of the future *Scottish* crown, then it is to be remarked that it is extrajudicial, unreasonable, and almost absurd, because it makes a man a natural born subject of a government, that was not in existence at his birth, nor perhaps for a long time afterwards. This *dictum* it is presumed is the foundation of the only respectable opinion against us, that of Judge *Tucker* in his edition of *Blackstone*. 2 *Tuck. Black. App.* 53, 54. 61, 62.

2. There is no treaty between *Great Britain* and the *United States*, which gives this right to *John Jackson*. The 6th article of the treaty of 1783, merely provided that there should be no future confiscations made, nor prosecution commenced against any person by reason of the part he had taken in the war; and that no person should on that account, suffer any future loss or damage in person, liberty, or property. The object obviously was to guard against future penalties and

(*a*) 7 *Rep.* 27 *b.*

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forfeitures; but it has nothing to do with escheats for want of inheritable blood. The losses in contemplation were of property actually possessed; otherwise a man might say he had *lost*, because he was not allowed to make future *purchases* of land. The 9th article in the treaty of 1794 stipulates that "*British* subjects, *then* holding lands in the territories of the "*United States*, should continue to hold them according to "the nature and tenure of their respective estates and titles, "and might grant, sell or devise the same to whom they "pleased, in like manner as if they were natives; and that "neither they nor their heirs or assigns should, so far as might "respect the said lands and the legal remedies incident "thereto, be regarded as aliens." This has no bearing upon the case of property held in 1784, and escheated at that time, on account of the alienage of the heir.

The arguments for the plaintiff were on the *first* question, that the state of *Pennsylvania*, by confirming the agreement between the commissioners of this state and *Virginia* relative to the disputed territory, had agreed that in the decision of disputes, preference should be given to the elder or prior right, whichever of the states it might have been acquired under. 2 *St. Laws*, 208. It was therefore in the first place a question of priority, which the evidence most conclusively settled in favour of *William Jackson*. To defeat the title thus superior in date to the defendant's, various objections had been urged. It was said he had abandoned his improvement. This was a question of fact, which the jury could not have decided, upon the evidence, in any other manner than they did. He left agents to prosecute and defend his settlement. It was said he became an alien. This also was in some measure a question of fact. He went before the war upon a temporary visit, which was prolonged by the breaking out of the war; and he returned as soon as the state of the two countries would permit him. It was said that an improvement before 1779 could give no right. But the act of 3d *May* 1779 is directly opposed to this doctrine, since it recognises settlement and improvement prior to 1778; and all that is decided by the case of *Jones* v. *Williams* is, that until the passing of that act, no right could be acquired by improvement prior to 1779.

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William Jackson continued an inhabitant up to the time the certificate was granted; and although he did not take the oath of fidelity, yet it is to be observed that the act of 3d *May* 1779 under which his rights vested, did not require it, and no subsequent law could defeat them by altering the conditions upon which they were to be enjoyed. The certificate of the commissioners of *Virginia* must have been founded upon this distinction. There is no evidence that it was obtained by deception, though the defendant certainly endeavoured to oppose it by a forgery; and under such circumstances, their certificate has always been considered evidence of title.

On the *reserved* point it was contended that the common law gave, and the treaties between the *United States* and *Great Britain* confirmed, the right of *John Jackson*.

1. By the common law. When *William Jackson's* right first accrued, the inhabitants of the *United States* and of *Great Britain* were subjects of one sovereign. *John Jackson* at that time could have inherited real estate left by his brother in the colonies, or in other words, he then possessed inheritable blood which intitled him to take his brother's estate in the colonies by descent. They were born under a common allegiance, which gave to them reciprocally this capacity of inheritance; and the question is in what manner has one of them lost it, while it is agreed, the other would have retained it to this day, had he lived. The inquiry at common law always is, whether the party was *alien born;* for by that law it is the condition of allegiance in which he is placed at his birth, that decides his capacity to inherit. Now it is clear that *John Jackson* was not alien born. Then how has he lost his inheritable blood? The same law destroys this quality only for the commission of certain crimes, which cannot be imputed to *John Jackson*. It follows that the inheritable blood remains. The judges in *Calvin's Case* (*a*), throughout their argument, refer to the state of things at the time of the party's birth, as fixing his character. "The time of his "birth is of the essence of a subject born; for he cannot be a "subject of the king of *England*, unless at the time of his

(*a*) 7 *Rep.* 18 *b.*

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"birth he was under the legiance and obedience of the king. "And that is the reason that *antenati* in *Scotland* (for that at "the time of their birth they were under the legiance of ano- "ther king) are aliens born in respect of the time of their "birth;" and then the report proceeds to state why such an alien born cannot inherit lands in *England*, notwithstanding the subsequent allegiance which the *antenati* owed to the *British* crown. The common bond of allegiance at the birth makes the inheritable blood. "Whosoever are born under one "natural legiance are natural born subjects." "Whosoever at "his birth cannot be an alien to the king of *England*, cannot "be an alien to any of his subjects of *England*." (25 *a.*) And "for as the *antenati* remain aliens as to the crown of *England*, "because they were born when there were several kings of "the several kingdoms, and the uniting of the kingdoms by "descent subsequent, cannot make him a subject to that "crown to which he was alien at the time of his birth, so "albeit the kingdoms *should by descent be divided and gov- "erned by several kings*, yet *it was resolved* that all those that "were born under one natural obedience, while the realms "were united under one sovereign, should remain natural "born subjects and no aliens." (27 *b.*) This is precisely the present case; and it is upon this principle that *American antenati* inherit lands in *England*. This doctrine, it is to be observed, is delivered as the resolution of the judges, and not as the *dictum* of one or a few, or the argument of counsel; and it is remarkable, as Lord *Coke* says in the concluding page of his report, that the case was decided without any discordance of opinion, the lord chancellor and twelve judges concurring. It has also been adopted by a respectable judge in our own country, who considers the principle to have been laid down by *Bracton*, and merely recognised in *Calvin's Case*, 2 *Tucker's Black. App.* 54.

2. By treaty. The same respectable judge holds, "that "the common law principle, that the *antenati* of both coun- "tries were natural born to both, and as such capable of hold- "ing or inheriting in both, was revived by the definitive treaty "of peace, as it was evidently the intention of the parties to "restore all individuals to the same condition they were in

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"before the war, as far as existing circumstances would permit, notwithstanding any part which they might have taken "either actually or *constructively* in the war." 2 *Tuck. Black. App.* 62. The treaty stipulated that no person should suffer on account of his part in the war, any loss in property; and considering that but for the circumstance of *John Jackson's* constructive agency in the war as a *British* subject, his inheritable blood would have remained, and he would have enjoyed the property in question, he may be said to lose it, if the objection prevails. It seems also by the treaty of 1794, that the right of *British antenati* to inherit, was taken for granted, because the 9th article stipulates generally for the succession of all the heirs, whether born before or after the peace, of such *British* subjects as then held property in the *United States;* that is, it goes so far as to provide for the claim even of *postnati* to the inheritance of such *British* subjects.

Cur. adv. vult.

On this day, the judges delivered their opinions.

TILGHMAN C. J. This is an appeal from the Circuit Court of *Allegheny* county. A verdict was found for the plaintiffs; the defendant moved for a new trial, and his motion was overruled.

Two questions were made on the argument. 1st, Whether *William Jackson* deceased, who died in the state of *Pennsylvania* about the year 1784, without issue, and intestate, had good title to the land in controversy? 2d, Supposing that he had title, whether *John Jackson* one of the plaintiffs, the elder brother of *William*, who was born in *Ireland* before the *American* revolution, and was never in any part of the *United States* is capable of inheriting as the heir of *William?* My opinion will be confined to the second question.

The plaintiff's counsel endeavoured to support the verdict on two principles. 1st, That by the common law, *John Jackson* was capable of taking by descent. 2d, That by the treaties between the *United States* and *Great Britain* in the year 1783 and 1794, the right of taking by descent was secured to him, even though it was not given by the common law. On the second point it is unnecessary for me to enter into an

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argument, because the law has been lately settled by the Supreme Court of the *United States* in the case of *Dawson's Lessee* v. *Godfrey*. 4 *Cranch* 321. It was decided that *Mrs. Dawson*, the lessor of the plaintiff, who was born in *England* before the year 1775, always remained a *British* subject, and was never in the *United States*, was to be considered as an alien, and incapable of taking by descent from her brother *Russel Lee*, a citizen of the *United States*. So far as regards the construction of treaties, the judgment of the Supreme Court is an authority by which this court is bound; because by the constitution and laws of the *United States*, the Supreme Court is, in such cases, the court of appeal in the last resort. But with respect to the principles of the common law, the opinion of that court is not binding. To say that it is, would be a voluntary, and unwarrantable surrender of the independence of the state courts. It remains then to be considered, whether by the common law as adopted in this state, *John Jackson* is an alien, incapable of taking land by descent.

By the declaration of independence (4th *July* 1776) all political connexion between *Great Britain* and the *United States* was dissolved. From that day the state of *Pennsylvania* became completely sovereign and independent; and the people of *Great Britain* and *Pennsylvania* had no other relation to each other than that of aliens; in war enemies, in peace friends. It has never been denied that this was the case so far as respected sovereignty and allegiance. But it has been contended, that by the principles of the common law prevailing in both countries, certain rights flowing from former connexion remained in the people of each; that the right of inheritance was unimpaired, in all those who were born before the dismemberment of the *British* empire, because the people of both countries were once bound in allegiance to the same sovereign. Considering this subject on the principle of reason, abstracted from authority, it would seem that the right of taking by descent, should be governed by the condition of the party at the time of the *descent cast;* because it is *then* that he is to enjoy the inheritance. The denial to aliens of the right of taking land by descent, must have been founded on political motives; on the danger of giving too much influence to persons, who so far from having

a common interest with the people of the country, may have an interest directly opposed to them. Now this danger is not lessened, by the circumstance of the people of two countries having been once bound in bonds of common allegiance. I suspect, if the principle contended for, could be traced to its source, it would be found to have originated in another principle, not compatible with the constitution of *Pennsylvania*, or her sister states; that is to say, that no man can, even for the most pressing reasons, divest himself of the allegiance under which he was born. This doctrine is founded chiefly upon *Calvin's* case. To the main point decided in that case, there can be no objection; it was simply this, that *Calvin* who was born in *Scotland*, *after* the crowns of *Scotland* and *England* were united in the person of *James* the first, was not to be considered as an alien in England. But the judges, in the course of their arguments, laid down many other principles, which being collateral to the point in question, were in some measure extrajudicial; and it is certain, that they have not all been received with approbation by their successors. I am informed however, and believe it to be a fact, that by the law as *now* held in *England*, citizens of the *United States*, born before the revolution, are capable of taking lands in *England* by descent. It is supposed by some, that merely for that reason, the courts of the *United States* should extend the same principle to the subjects of *Great Britain*. To this I cannot assent. I confess I should be mortified, if my own country was surpassed by any on the globe, in acts of humanity and benevolence. But it is evident, that courts of justice have no right to regulate these matters. They are for the sovereign power of the nation. The judges must decide according to the law. The *English* adhere to their principle, that those who were born under the king's allegiance, can never be considered so completely aliens, as to be incapacitated from taking land by descent. But I apprehend, that they restrict the right of inheritance to the case of persons either *born* under the king's allegiance, or being under it at the time of the descent cast. I presume they do not extend it to all those, who have owed a temporary allegiance; for instance, to the inhabitants of a country conquered in war, and ceded by the treaty of peace, to its former sovereign. This principle then, even if sound, cannot be applied to the circumstances of the

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United States; because although there was a time when the people of *England* and the *United States* owed allegiance to the same sovereign, yet there never was a time when the people of *England* owed allegiance to the *United States.* I have said, that the judgments of the Supreme Court of the *United States* are not binding on us, except in cases where an appeal lies to that court. But they are intitled to very great respect, and consideration; certainly to much more, than the judgments of any court in *England* since the revolution. Now the very point before us, has been expressly decided by the Supreme Court in the case of *Dawson's Lessee* v. *Godfrey* which I have mentioned. It would have been more agreeable to me, if this cause could have been decided without my opinion; because, having argued the same point at the bar of the Supreme Court in the case of *M'Ilvaine v. Coxe*, it is possible that my mind may have retained some of the impressions it received in preparing for that argument. But upon reflection, I have concluded, that it would be more satisfactory to the country to know the opinions of all the judges in a case of so much importance. Having considered it attentively, since the argument in this court, my opinion is, that *John Jackson*, not now owing allegiance, and never having owed allegiance, to the *United States*, is in all respects an alien, and as such incapable of taking land by descent. I am therefore for a new trial.

YEATES J. The plaintiff obtained a verdict in this cause on a trial at a Circuit Court held for the county of *Allegheny*, subject to the court's opinion on a reserved point, whether *John Jackson* could take by descent as elder brother and heir at law of *William Jackson?*

The Circuit Court gave no opinion on the question, considering it as a matter of national moment. The counsel by mutual consent have argued the case before the whole court in bank.

The claim of *William Jackson* rested on a *Virginia* entry made in his behalf on the 18th *March* 1780, for 400 acres on *Montour's* run, and a subsequent survey made thereon upon the 12th *January* 1786. He went to *Ireland* in 1774, and returned from thence in the spring of 1784. He died intestate

prior to the act of assembly passed 19th *April* 1794, 3 *St. Laws* 521; and the question to be determined is, whether the lessor of the plaintiff, who was never in the *United States*, as his elder brother, could intitle himself as his heir.

It has been contended on the part of the plaintiff, that *British* subjects born previous to the treaty of peace, concluded on between the *United States* and *Great Britain* on the 3d *September* 1783, might well inherit lands in *America* after the separation of the two countries; and that the two brothers, being subjects of the same sovereign before the declaration of independence, could hold under each other by descent; that their rights were only suspended during the war, but were revived by the peace.

The court felt the importance of the subject in a national view, and considered uniformity of decision in a case of this nature in the tribunals of the different states, as a peculiar *desideratum*. They well knew that the question had been fully argued in the Supreme Court of the union, and that it must necessarily receive a decision in the *dernier resort*. We have not been disappointed in our expectations. The opinion of the Supreme Court of the *United States* delivered by *Johnson*, Justice, 4 *Cra.* 322, in *Dawson's Lessee* v. *Godfrey*, settles the point reserved in this case, if its authority is admitted. It is there laid down that the correct decision of the *English* law is, that the right to inherit depends upon the existing state of allegiance, *at the time of the descent cast*. The *antenati* of *America* may continue to inherit in *Great Britain* because we once owed allegiance to that crown. But the same reason does not extend to the *antenati* of *Great Britain*, because they never owed allegiance to our government. It would be a contradiction in terms, to assert, that one owes allegiance to a government, which did not exist at the time of his birth. I forbear to detail further the argument adduced in support of the opinion delivered; and I shall only add that I perfectly concur therein.

The judgment of this court cannot be rendered on the verdict in favour of the plaintiff, but a nonsuit should be entered; or if the plaintiff's counsel desires it, a new trial may be awarded without costs.

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BRACKENRIDGE J. having been of counsel in the cause while at the bar, declined giving an opinion.

New trial awarded.

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Lessee of M'CLEMMONS *against* GRAHAM.

Pittsburg, Friday, September 7.

An appeal does not lie from the Common Pleas to the Supreme Court. The act of 11th *March* 1809, which authorizes *appeals* and writs of error from and to the courts of the several counties, means that causes shall be removed by one or the other mode, according to the course of proceeding in the respective courts, namely, by appeal from the Register's Court and Orphan's Court, and by writ of error from the Quarter Sessions and Common Pleas.

THE defendant removed the proceedings in this cause from the Common Pleas of *Butler* county to this court, by appeal; and a motion was now made by *Baldwin* for the plaintiff to quash the appeal.

A. W. Foster for the defendant contended that an appeal was given by the 6th section of the act of 11th *March* 1809, which enacts "that appeals and writs of error may be had "and may issue to and from the Supreme Court of the pro- "per district, from and to the courts of the several counties "&c." 9 *St. Laws* 38.

This language he said was sufficiently comprehensive to give the party the option of taking a writ of error, or entering an appeal, accordingly as the error of the proceeding below appeared upon the record, or was extrinsic to it; and such an option might be presumed to have been intentionally given by the legislature, because the same law abolished the Circuit Court, from which it was well known that by the act of 20th *March* 1799, appeals lay to the Supreme Court from almost every decision which a judge of the Circuit Court could make. There was an obvious propriety in preserving to a suitor whose cause was transferred by the act of 1809 from the Circuit Court to the Common Pleas, all the remedies he had enjoyed prior to that law.

Baldwin in reply answered that the omission of the act of 1809 to give an appeal from the Common Pleas in express terms, was of itself fatal to the proceeding, because the legislature had the precedent of an express grant of that remedy by the Circuit Court law. They had on the contrary spoken of all the courts and of both the remedies in general terms.

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without apportioning to the respective courts their peculiar proceeding, leaving that to be done according to the course previously followed in those courts—namely a writ of error to the Common Pleas, and an appeal from the Orphan's and Register's Courts. An appeal from the Common Pleas would be attended with insuperable difficulty; for the evidence being generally parol, it would be impossible to bring it into the Supreme Court upon a rehearing. In the Circuit Court law that difficulty did not exist, because the judge of the Circuit Court was at the same time a judge of this court.

Tilghman C. J. The defendant entered an appeal from the judgment of the court of Common Pleas of *Butler* county, and the cause comes before us on a motion by the plaintiff to quash the appeal. This is the first instance of an appeal from the court of Common Pleas. The only mode of correcting errors has been by suing out a writ of error. The defendant endeavours to support his appeal on the act of 11th *March* 1809, intitled, a further supplement to an act, intitled, "An "act to alter the judiciary system of this commonwealth." By the 6th section of this act it is enacted, that "appeals and writs "of error may be had, and may issue to and from the Supreme "Court of the proper district, from and to the courts of the "several counties." At the time of making this law, there were some courts in the several counties, namely, the Orphan's Court and Register's Court, from which an appeal lay to the Supreme Court; and there were other courts of the several counties, namely, the court of Common Pleas and Quarter Sessions, to which writs of error were issued by the Supreme Court. The natural construction therefore of the clause in question, is, that causes may be removed from the courts of the several counties to the Supreme Court, by appeal, or by writ of error, according to the usual course of proceeding in the respective courts. There is a very great difference between proceedings on writs of error and appeals. In the former, matters of law only are examinable. In the latter, matters of fact. And it is the idea of the defendant's counsel, that on the appeal, the court may go into consideration of the evidence given to the jury, and order a new trial, should they be of opinion, that the verdict was against the weight of

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the evidence. But how are this court to know the parol evidence offered to the jury? By the notes of the judge, who tried the cause, it is answered. And these notes are now laid before the court, although they are certainly no part of the record. Had the legislature intended so important an alteration in the trial by jury, they certainly would have expressed their intention explicitly. Indeed if the matter rested solely on the words of the act, without reference to any other act, I do not suppose the construction now contended for would have been thought of. But another act has been introduced in order to throw light on the subject. I allude to the act of 20th *March* 1799, by virtue of which one or more of the judges of the Supreme Court, held a court called a Circuit Court in each county, except the county of *Philadelphia*, instead of a court of *Nisi Prius*. By the fourth section of this last act, an appeal lay from the Circuit Court to the Supreme Court, if either party was dissatisfied with the opinion of the Circuit Court "on any demurrer, special ver-"dict, case stated, point reserved for the consideration of "the court on the trial, motion in arrest of judgment, or for "new trial, or to set aside a judgment, discontinuance, or "nonpros." In fact those Circuit Courts partook in great measure of the nature of courts of Nisi Prius, and upon the hearing of the appeal, the notes of the judge were resorted to in the same manner, as on motions in bank, after trials at Nisi Prius. This was very convenient. But the same system would be extremely inconvenient, if applied to the courts of Common Pleas, because the judges of those courts cannot attend the Supreme Court, to afford explanations, and to correct inaccuracies and imperfections, which often occur in the notes of men the most able and experienced. Those Circuit Courts were abolished by the act now under consideration. But the counsel for the defendant supposes, that the object of the clause on which he founds his appeal, was, to give an appeal from the Common Pleas in all cases in which it lay from the Circuit Court. I cannot agree with him. Had such been the object, I must think, that some proper words would have been introduced to attain it. The Circuit Courts were abolished. It was seen that while they existed, appeals of an extraordinary nature lay from them to the Supreme Court, yet nothing is

said of those cases, in the law which abolished the Circuit Courts. It is only declared in general terms, that appeals and writs of error shall lie from the courts of the several counties to the Supreme Court. The conclusion is strong, that it was the intention of the legislature to place appeals and writs of error on the same footing that they were before the Circuit Courts existed.

I am therefore of opinion, that no appeal lies in this case, and that the motion of the plaintiff's counsel should be granted.

Yeates J. and Brackenridge J. concurred.

Appeal quashed.

Irish and others *against* the Commonwealth.

IN ERROR.

Pittsburg, Tuesday, September 11.

If the auditors of commissioners' accounts, do not make return of their report at the *next* term of the Common Pleas after the *settlement*, the commissioners are intitled to sixty days after actual notice of such return to enter an appeal. *Qu.* Whether such a report, though filed in the office of the Pleas, is a lien upon the estate of the delinquent commissioner, unless it is so filed by an order of the court, and an entry of such order made upon the docket or court minutes.

THIS was a writ of error to the Common Pleas of *Allegheny* county.

By the *first* section of an act of the General Assembly, passed the 30th of *March* 1791, the respective courts of Common Pleas throughout the state, were enjoined to make an annual appointment of three reputable freeholders to audit and settle the public accounts of the treasurer and commissioners of the county. (*a*) By other sections of the act, very large powers were given to these auditors over persons and papers of both parties and witnesses; and in order to render their report effectual against any delinquent officer whose accounts were audited by them, the 5th section contained the following provision: "That the said auditors having exam- "ined and settled the said accounts to the best of their skill "and ability, shall report the same with the respective ba- "lances due to or from such commissioners or treasurers, to "the *next* county court of Common Pleas for such county,

(*a*) By an act of the 15th *March* 1809, 9 *St. Laws* 42, this law is so far altered as to take the appointment of auditors from the court, and to confer it upon the people at their general elections. In other respects the act of 1791 continues in force.

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"*who shall thereupon cause such report and settlement to be* "*filed among the records of the said court; and such report* "*from the time of being so filed, shall have the effect of a judg-* "*ment* upon the lands, tenements, and hereditaments of such "commissioner or treasurer, who shall thereby appear in- "debted. *And if within sixty days after such report made and* "*filed, the said commissioners and treasurers, their executors* "*and administrators or any of them, shall enter their appeal* "*to the said court from the said settlement or any part thereof,* "*it shall be lawful for the court to direct an issue*, wherein "the commonwealth shall be made plaintiff or defendant, as "the case may require, to be tried by a jury during the next "term, upon whose verdict final judgment shall be entered." 3 *St. Laws* 34.

At *June* term 1803, auditors were appointed by the Common Pleas of *Allegheny* to audit the accounts of the plaintiffs in error, who were county commissioners; and they returned a report into the office of the Common Pleas on the 13th of *September* 1805, on which day the report was indorsed by the prothonotary, "*Filed 13th September* 1805."

On the 17th *September* 1808, the commissioners appealed from this report to the Common Pleas, and prayed the court to direct an issue; but the court quashed the appeal, on the ground that it was too late.

It was here, among other reasons, assigned for error, that the report of the auditors should have been made to the next term after their appointment; or if not, then to the next term after the settlement, when it became the duty of the court by a judicial order to cause the report to be filed among their records, from which time alone the sixty days from the appeal would run. But that the present report was not made until more than two years after the appointment,—it did not appear when the settlement was made, and therefore it could not appear that it was made at the next term after the settlement, —it was not made to any term whatever, having been filed in vacation,—and there had been no act of the court upon it. It followed that these irregularities would prevent the sixty days from running at all; at all events they could not run until actual notice of the filing had been given to the commissioners, which was not the case here.

It was also assigned for error, that it did not appear that the auditors had given notice to the commissioners to attend before them, at the time of the audit.

When the case was first opened at last *September* term, their honours intimated an opinion that to make the filing of the report valid, it should be laid before the court, and an order be given for filing; but whether this had been done in the present case, they were unable to collect from the entry; they therefore recommended it to the counsel to take the record back to the Common Pleas, and endeavour to have it stated therein, whether any such order had been given by the court. At the present term, however, it being understood that the judges of the Common Pleas declined certifying in relation to the fact, this court delivered judgment upon the record as it stood.

Baldwin for the plaintiffs in error.

Semple for the defendant in error.

TILGHMAN C. J. "The act to provide a more effectual method of settling the public accounts of the commissioners of the respective counties &c." authorizes the court of Common Pleas to appoint annually, at such time as they shall think proper, three auditors, to audit, settle and adjust the public accounts of the commissioners &c. By the 5th section of this act, the auditors are directed, after having examined and settled the said accounts, to report the same to the *next* county court of Common Pleas, who shall thereupon cause such report and settlement to be filed among their records; and such report, from the time of being so filed, shall have the effect of a judgment upon the lands &c. of such commissioners &c.; and if within sixty days after such report made and filed, the said commissioners shall enter their appeal from the said settlement, it shall be lawful for the court to direct an issue &c.

In the case before us, the auditors were appointed at *June* term 1803. It does not appear at what time they settled the account of the plaintiffs in error; but they made their report of the settlement on the 13th *September* 1805, on which day

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the report is indorsed "filed," in the handwriting of the prothonotary. This is the only record of its being filed. Now the 13th *September* was not in term time, but during the vacation, so that it is not shewn by the record, that the report was submitted to the court, or filed by their order. Knowing the very informal manner in which it has been the custom to transact business in the courts of Common Pleas, I shall always be inclined to give great indulgence to informality. I do not think it necessary that an entry of the order for filing the account should be made in the minutes of the court, although it certainly would be best to make such an entry. I should think the indorsement in the handwriting of the prothonotary sufficient evidence of the court's order. But if such indorsement bears date in the vacation, it will be impossible that the report can have been *then* filed by the court's order; and in such case the utmost that could be supposed, would be that the paper had been filed at that time by the prothonotary, and produced by him to the court at the next term, who thereupon directed it to be filed. Under these circumstances, the lien would take effect from the *next* term. But there is no question now concerning lien; the point is whether the commissioners are barred of their appeal, because not made in sixty days from the filing of the report. Whether the report is to be made by the auditors at the next term after their *appointment*, or the next term after the *settlement of the account*, is not very clearly expressed. I prefer the latter construction as being more agreeable to grammar, and much more conducive to public convenience. To refer the words *next court*, in the *fifth* section of the act, to the authority given to the court to make the appointment in the *first* section, is forced and unnatural, when they may be with more propriety, referred to the *time of settlement* mentioned in the same 5th section and immediately preceding. Besides, there could be no good reason for tying up the auditors to make their report at the next term after their appointment. It might be impossible to make a report in so short a time, without doing injustice either to the public or the accountant. But it does not appear on this record, that the report was made to the court *next after the settlement*. We know not when the account was settled, for it bears no date. On this defect I found my opin-

ion. It was incumbent on the accountant to attend at the next court after the settlement in order to enter his appeal, if the report was made. But if no report was then made, the law was not strictly complied with by the auditors. To give it a liberal construction we will say, that the auditors might return it afterwards. But while we construe the law liberally with regard to the public, we must not be illiberal and oppressive to the commissioners. If the report is not made at the time when it ought in strictness to be made, the commissioners ought to have notice of the time of its being actually made, and the sixty days for entering the appeal, should run from such notice. Inasmuch then, as it does not appear, that the report was made within the time prescribed by law, nor that the plaintiffs in error had notice of its being filed sixty days before they entered their appeal, I am of opinion, that the appeal was well entered, and that the judgment of the court of Common Pleas should be reversed.

YEATES J. The act of assembly passed 30th *March* 1791 directs, that the auditors appointed annually by the courts of Common Pleas of each respective county, after having examined and settled the accounts of the treasurers and commissioners, "shall report the same with the respective balances "due to and from such commissioners or treasurers, to the "*next* county court of Common Pleas for such county, who "shall thereupon *cause* such report and settlement to *be filed* "among the records of the said court; and such report from "the time of being so filed shall have the effect of a judgment "upon the lands of such commissioner or treasurer, who "shall thereby appear to be indebted." An appeal is given, on the party's entering into recognisance with two good sureties, if entered within sixty days after such report made and filed; but in default thereof, execution shall issue in like manner, as upon judgments recovered in the usual course of law. The auditors are impowered to cause the commissioners and treasurers to come before them, and to compel the production of all books, papers, accounts and vouchers relative to the said public accounts; and also to compel the attendance of witnesses.

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Three things appear necessary under the provisions of the act, to confer validity on the proceedings. 1. That the parties whose accounts are to be settled should appear before the auditors, or at least should receive notice for that purpose. 2. That the balances should be reported to the next court of Common Pleas after the appointment of the auditors, or at least after the settlement of the account; and 3. That the court should *cause the report to be filed* among their records.

1. It does not appear by the report of the auditors, that the plaintiffs in error were notified to appear before them by subpœna or otherwise; nor has any extrinsic evidence been offered or suggested to prove it. On the contrary it is expressly assigned for error, that the auditors did not call the commissioners before them to account for their proceedings. The first principles of natural justice require, that a man shall not be condemned unheard.

2. It appears by the records of the court of Common Pleas, that the three auditors were appointed in *June* term 1803, which commenced on the 27th of that month. The *next* term would be in *September* 1803 according to the law as it then stood; but the report was not filed until the 13th *September* 1805, after the intervention of eight terms, and in the vacation. The *September* term of that year began on the 23d day of the month. I am fully aware, that in many instances in different counties, reports of such auditors have been filed when the courts were not sitting; and when the court have in anywise acted upon them, as by causing them to be filed, or inserting them on the dockets, or doing any other matter of the like nature however slight, that filing them by the prothonotary in the vacation would be equivalent to a return in term time; but to give the report under such circumstances validity, it should be filed some day previous to the term next succeeding the appointment. At all events, no such surprise should be effected on the party against whom a balance is found, as should lead him to the loss of his appeal within the sixty days limited by law.

3. In the present instance, the court of Common Pleas at our last term here, declined giving any certificate, whether the report of the auditors was laid before them, or whether

they had done any act relative thereto. I regard the second ground of objection as fatal to these proceedings. Even admitting, what there is no proof or even statement of, that the plaintiffs in error appeared and were heard before the auditors, no report was made of the several balances for nearly twenty-seven months after their appointment. The time of settlement of the accounts is not stated in the report; whether the report was filed at the next term afterwards therefore cannot appear. And upon the same grounds, on which this report is attempted to be established as a lien conclusive on the commissioners, against which they can have no redress, might another report be established, made fifteen or twenty years after their appointment. Where a term is suffered to elapse, after the appointment of the auditors, before the report is made, nothing in my idea can cure the defect arising from the delay, except actual notice of the report being returned and filed. Such a step would put the accounting parties on their guard, and obviate all objections arising from surprise; but this has not been done in the case before us. If the plaintiffs in error are justly indebted to the county of *Allegheny*, in their character as commissioners, either from gross negligence in their official conduct, or otherwise, the laws afford a full and ample remedy to the good people of the county to coerce the payment thereof. But if by the present mode of procedure, the former should be precluded from a rehearing, they are wholly without remedy, though they should not be responsible for a single cent to the county. I am of opinion, that the judgment of the court of Common Pleas should be reversed.

BRACKENRIDGE J. This case turns on the construction of the act of *March* 30, 1791, and that provision of it which is in these words, "that the said auditors having examined and "settled the said accounts, shall report the same to the *next* "county court of Common Pleas of such county, who shall "thereupon *cause* such report and settlement to be filed "among the records of the said court, and such report from "the time of being so filed, shall have the effect of a judg- "ment," with an appeal if entered within sixty days, and issue to be tried by a jury, &c.

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The duty prescribed to the auditors, by this act, would seem to be to report *to the court;* which could not be done unless when the court was sitting; the report being made by handing it to the clerk, in order that it may be read to the court. But I should not think this sufficient. It is their duty to see that it comes before the court actually, and not constructively by being delivered to the clerk. The clerk is not the court: he is but the officer of the court; and, in strictness, I do not know that he can be called upon to read the report, or to hand it to the court. It is an act enjoined upon the auditors themselves, to make this report; that is, to bring it into court, and deliver it. Much less can I have any idea that delivering it to the clerk in the *vacation*, is making it to the court, who, in that case, may not hear of it, until the *sixty days* have elapsed; and the party to be affected by it, may equally remain for the sixty days, without any knowledge of the delivering it to the clerk. I can have no idea that the clerk's receiving it in vacation, or even in term time indorsing upon it, *filed*, and putting it amongst his papers, is what is contemplated by the act as making it *a record*. Shall a purchaser be at the mercy of a lien which depends upon the depositing in a pigeon-hole, when he recurs to the records of the county to inspect the liens upon real estate? Shall the party against whom the report is, be at the mercy of such indorsement and depositing, of which he may not have knowledge? I cannot say that the indorsement, *filed*, carries with it evidence of an act of the court; because it purports only to be the act of the clerk in receiving it and putting it amongst his papers. I take it that a fair construction of the act requires, and the reasoning from the inconvenience and the mischief shews, that the report ought to be made in open court, and brought to the knowledge of the court that they may act upon it; that it ought to appear that they did act upon it, by an entry on the docket of the court, which is the record; and that *papers filed* are the documents to which it refers. It is the docket only which a purchaser inspects when he looks for the record of a judgment. I cannot say that the report, even being read in court and ordered to be filed and indorsed, and put in a pigeon-hole without an entry on *the docket*,

ought to be called a record within the meaning of the act; because it does not give notice.

It is alleged that nothing more is found in most counties than such filing to make a lien. But I cannot avoid considering it as insufficient to make a lien; much less preclude, after sixty days, to a person who has had no knowledge of such filing, the benefit of an appeal, and the privilege of a jury trial. If the officers of the county are guilty of an oversight or a mistake, I cannot cure their errors at the expense of an individual. If on a *certiorari* to the court of Common Pleas they could add to their return the fact that it was read; or if they certified without *certiorari*, as they were moved to do in this case, that the report actually had been read and ordered to be filed, it might suffice to support the refusing the appeal, and the privilege of a jury trial after sixty days; but I cannot see that it could be a lien against purchasers by any possible means until put upon the records of the court by an entry on the docket of the order of the court causing it to be filed; or that the report can be said to be among the records of the court so as to constitute the lien of a judgment. Even usage universal in the counties could not amount to evidence of the sense of the community upon this point, and be such a *common error* as to amount to law. I do not look to what may be a general inconvenience as to the losing the lien in some cases, so much as to the manifest injustice in this particular case, where from the court refusing to certify as to its being read in the court, there is ground to infer that it was not read, but merely handed to the clerk in vacation and deposited in a pigeon-hole, without any thing more being heard of it until after the sixty days; more especially, as it is stated in this case, that the principal defendant *Irish* was absent out of the county, and on public business, being a member of the legislature. It is the first time the construction of the act in this particular has been brought before this court, and I think it safer to *consider what ought* to be done, than what has been done; for we are to correct errors, not to sanction them from their respectability in number. The *nos numeri sumus*, will not save them with me, where such flagrant injustice may accrue to an individual, as would seem to have taken place here.

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I have been struck sometimes with what takes place in the office for recording deeds, which from the necessity of the case cannot be avoided, it being impossible to copy one deed on the record until the preceding has been copied, which requires time; and hence it is the usage, which cannot be avoided, of indorsing on the deed the day it is received for recording. But the register keeps, or ought to keep, a list of such indorsements in the nature of a book of entries, which a purchaser can inspect, and will be shewn to him when he inquires for the record of a deed.

Under the act of assembly directing transcripts from a justice which are to affect as judgments, they must be entered on the records of the court, that is, *the docket.* Merely indorsing and putting into a pigeon-hole, will not suffice.

I may be mistaken, but these are my ideas of the reason and nature of the case, and from analogy to that which has the effect of notice in other cases. While the legislature intended to secure the county by a lien, I cannot think but that, having given the benefit of an appeal, and the privilege of a jury trial, they must have meant that a defendant should have the opportunity of knowing when the report was filed; not that after he has been heard by the auditors, he has to go every day to the clerk of the court in vacation, to get him to search among his papers to see whether such a report has been delivered to him, lest the sixty days should elapse, which is not from the date of the hearing before the auditors, but *from the time of making their report*, which may be unknown to him, as in fact the case here was said to be. It would be imposing on him an unreasonable vigilance to be thus watchful; and with all his vigilance the sixty days may have elapsed before the *sitting* of the court; and it might be then said that he was too late.

In this case it was stated that there had been no hearing before the auditors; but as that does not appear upon the record, it cannot be made a ground of reversing the judgment. But taking it to be the fact, it may serve to shew the mischief that may be suffered from considering the *mere filing* a paper with the clerk, and its lying there sixty days, to become a judgment, or affect as a lien; or that this indorsement, and the court overruling the appeal on account of the lapse of

sixty days, should be supported and sanctioned by the court in the last resort.

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The difficulty in this case, is the effect it may have upon the lien from the bare filing, which is said alone to appear in the returns of auditors, in *most counties throughout the state*. To leave the matter open, therefore, as to this, having thrown out these observations generally, I confine myself to what appears in this particular case, wherein the filing evidently was in the vacation; because, there does not appear to have been a court sitting at the time; and there is no evidence of the court *causing it to be filed*, unless from the implication of the court *refusing the appeal;* which their refusing to certify repels, and leaves the matter on the mere *indorsing of the clerk, and filing in the pigeon-hole*. I am therefore of opinion to reverse the judgment.

Judgment reversed.

JACK *against* EALES.

IN ERROR.

Pittsburg, Tuesday, Sept. 11.

THIS was a writ of error to the Common Pleas of *Westmoreland*, to bring up the record and proceedings in an action of *homine replegiando*.

TILGHMAN C. J. delivered the court's opinion.

The plaintiff in error claimed the defendant as his servant until the age of twenty-eight years, under the act of assembly of 29th *March* 1788.

In support of his claim, he produced an authenticated copy of an entry on the records of *Washington* county, as follows: "*Joseph Bently* of *Washington* county in *Nottingham* township, millwright, enters a female negro child (agreeably to law) named *Eales*, and aged three years and seven months. Oath made before *Wm. Parker* esq. to the age &c. of the said child, the 1st day of *April* 1789."

The act requires the entry to be made on or before the

When the record of the entry of a negro or mulatto child in the office of the clerk of the peace, under the act of 29th *March* 1788, does not bear any date, the jury must say whether it was made on or before the 1st *April* 1789. That act, notwithstanding it authorizes and requires the clerk of the peace to administer to the claimant an oath in verification of the return he makes of the age and description of the child, &c. does not prevent a justice of the peace from doing it by virtue of his general powers.

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1st of *April* 1789, or within six months next after the birth of the child, and to be verified by the oath of the party, which the clerk of the court is authorized and required to administer.

Two questions arose on the entry in this case—1st, Whether the entry was made on or before 1st *April* 1789. The record was defective in bearing no date, but the party is not to be injured by this omission of the clerk, provided the entry was really made in due time. That was a fact for the decision of the jury. The second question was, whether the oath was legally administered. The court of Common Pleas were of opinion that it was not, because it ought to have been administered by the clerk, and not by a justice of the peace. In this we think they were wrong. The clerk was authorized and required to administer the oath, but this was not in exclusion of the general power of justices of the peace to administer oaths. Inasmuch therefore as it appears that the oath was taken before *William Parker* who was a justice of the peace, it is the opinion of this court that the entry was sufficient. The judgment of the court of Common Pleas must therefore be reversed.

Judgment reversed.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

Southern District. September Term, 1810.

3b 103
4s r471
3w466

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Lessee of BLAINE *against* JOHNSON.

Chambersburg, Tuesday, October 2.

A descriptive location, the survey on which is unreasonably delayed, loses its preference against a subsequent warrant or location with a prior survey, —against a settlement right acquired before the survey on the old location, —and against a notorious well established possession under a subsequent descriptive location.

Qu. Whether a person residing on one tract, can make a legal settlement *by a tenant* on another tract, so as to acquire a legal settlement right.

THIS was an appeal from the judgment of the Chief Justice at a Circuit Court for *Cumberland* in *June* 1807.

It was an ejectment for a messuage and 240 acres of land, to which the plaintiff claimed title, under an application of the 8th *October* 1766, No. 1499, in the name of *James Byers*, for "250 acres in *West Pennsbury* township, *Cumberland* "county, joining lines with *John Byers up* the south east, "and *M'Callister's* land on the east." A survey was made on this application upon the land in dispute, on the 8th of *November* 1787, (according to the return of survey,) by *Samuel Lyon* deputy surveyor, who stated in a note to the return, that the land was disputed by the heirs "of *William Carothers*, who "claimed under warrant to him of 100 acres dated *December* "28, 1770, and an application for 300 acres No. 4993, dated "25th *May* 1768, and had agreed to refer the dispute to the "board of property." On the 15th *May* 1768 *Byers* conveyed to the lessor of the plaintiff.

The defendant was tenant to the heirs of *William Carothers*

Qu. Whether the Supreme Court can upon an appeal from the Circuit Court, hear any evidence which was not before the Circuit Court, even though such evidence has been discovered since the trial in the Circuit Court, and its discovery is the ground of an application to the Supreme Court for a new trial.

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who claimed in part under an application of the 21st *May* 1768 in the name of *William Carothers* junior for 300 acres "adjoining *William Carothers*, *Andrew M'Callister*, *Daniel* "*M'Callister*, *John M'Clure*, *and Abel M'Callister* junior, in "*West Pennsbury* township *Cumberland* county;"—partly also under a warrant of the 28th *December* 1770 in the name of *William Carothers* junior for 100 acres, "joining land of "*John Maclure*, *William* and *James Carothers*, in *West* "*Pennsbury* township, *Cumberland* county;"—and partly upon a settlement by *Carothers* about the year 1776, or at least upon a notorious possession of the property by him at and after that time, under his descriptive location.

The deputy surveyor, who was examined for the defendant upon the trial, could not say how long it was since he had made the survey in the name of *Joseph Byers;* there were at that time some buildings on the lower part, some land was cleared, and he thought some persons were living there; but whether under *Carothers* or not, did not appear. The survey in the name of *Byers* he said answered the location; and although it might have been laid in a different direction to answer the location, yet it would not have answered it so well; it would not have joined *M'Callister* on the east. In 1785, when the witness made a survey of some adjoining land for *John Reynolds*, the land in dispute was claimed by both *Carothers* and *M'Callister*.

Other witnesses swore that in 1776 or 1777 there was a cleared field upon the land in dispute, 20 or 25 rods long, and 30 or 35 feet wide, which was in possession of *William Carothers* who resided on his neighbouring farm.

Duncan for the defendant contended, that admitting the plaintiff's location to describe the land surveyed, still it gave no title, as it had not been pursued for more than twenty years, and in the mean time the defendant obtained a descriptive location of the same land, and either made a settlement, or took notorious possession of the land under it, prior to the survey. That from these circumstances the law was clearly in his favour.

Watts for the plaintiff, acknowledged that a location *and survey* for the defendant, subsequent to the plaintiff's loca-

tion, and prior to his survey, would give a preference; and that a settlement and *residence* according to law, prior to the plaintiff's survey, that is, such a settlement as is mentioned in the act of 1786, an actual, personal, resident settlement, would under the circumstances of the plaintiff's survey, be preferred to it; but he denied, that a man resident on one tract, could acquire a right to another tract by a settlement made for his use by a tenant, or by such a possession as was said to have been in *Carothers*. It was observable, that the deputy surveyor in his note to the plaintiff's return, did not place the claim of *Carothers* upon settlement or possession, but on the application and warrant; and if there was a tenant upon the land in 1787, it did not appear that he held under *Carothers*, and therefore the defendant could not derive title through him.

The Chief Justice, after stating the evidence to the jury, told them, that the plaintiff's location of 1766 not being surveyed until 1787, a prior survey under a subsequent location or warrant, would be intitled to a preference. So would a settlement right legally acquired before the plaintiff's survey, that is, a settlement accompanied with residence as described in the act of assembly. So also would a notorious and well established possession under a location subsequent to the plaintiff's, descriptive of the land in dispute; but to establish this right of possession, it should be clear and certain. He did not think that clearing a few acres adjoining to another plantation, would, without a survey, give a right to a large undefined tract of land; but the notoriety and extent of possession was a fact which he left to the jury. With regard to the point, whether *Carothers*, living on one tract of land, could make a legal settlement so as to acquire a settlement right, by a *tenant* on another tract, the Chief Justice wished the jury for the present to suppose that he *might*, reserving that point however for future consideration, in case the jury should find for the defendant. This point he thought doubtful, and wished it to be settled by the Supreme Court in bank.

The jury found for the plaintiff; and a motion for a new trial being overruled, the defendant appealed.

Upon the hearing in this court, the defendant offered to

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shew by evidence, that since the trial, he had caused the trees of the plaintiff's survey to be blocked, and that their growths did not in any instance correspond with the alleged time of that survey. But the court refused to hear the evidence. His counsel then relied upon the field notes of *Lyon* the deputy surveyor, who was the brother-in-law of the plaintiff, to shew by a memorandum therein that the lands in dispute were "surveyed for *Carothers*' heirs and *Blaine*, "in dispute," and not as the official return set forth, upon the order for *Byers*; and they produced two papers, one the original order of survey, the indorsement on which, "executed *November* 8th 1787," had been written on an erasure, the figures 1798 being distinctly visible under the other figures, the other a protracted draft of several surveys laid down together on the 18th *November* 1791, for *Wm. Carothers*, found in the office of the deputy surveyor, who succeeded *Lyon*, and which, though it noted in the margin several interferences with the lands of *Carothers*, did not mention the plaintiff's interference. A similar draught was shewn on the trial, but without date. Upon this evidence, discovered since the trial as was said, as well as upon the merits as they appeared in the Circuit Court, the motion for a new trial was argued.

YEATES J. I fully assent to the charge of the Chief Justice, and think the case went to the jury upon the true points of inquiry. The plaintiff's application in the name of *James Byers* was dated on the 8th *October* 1766, but not being specially descriptive of the lands in question, no title became vested in him, until the same was surveyed. The warrant and application in the name of *William Carothers* junior, under which the defendant claims, are of later dates. It was fairly submitted to the jury to determine, whether the same were surveyed prior to the plaintiff's, or whether a settlement right was legally acquired; or a notorious well established possession under a location descriptive of the lands, though subsequent to the plaintiff's, existed previous to the plaintiff's survey. They were instructed, that as these facts were found either in the affirmative or negative, so ought to be their verdict. But clearing lands beyond the limits of a man's lands without an intention of settlement, will not confer a settle-

ment right. It is clear therefore, that the time of execution of the plaintiff's order of survey, became highly material.

The official return of survey by *Samuel Lyon*, the brother-in-law of the lessor of the plaintiff, purports, that the survey was made on the 8th *November* 1787. This is evidence of that fact, but not conclusive. It may be repelled by other proof. Mr. *Lyon* on his examination swore, that he could not tell when he made the survey on the application of *Byers;* nor who were the chain carriers; that there were some buildings on the lower part of the land, and some land cleared then near the road, on the north side of it; and that some persons were living there; and that he made a large draught of lands surveyed for *William Carothers*, which was shewn to him in court, *without date*, which he declared to be a private survey without warrant, or any public authority.

The defendant's counsel have insisted, that material evidence has been discovered since the last trial, which would shew that the plaintiff's survey was not executed on the 8th *November* 1787. The court will, under special circumstances, award a new trial upon such grounds, where a proper case is made; but where the non-production of it on the trial arises from the neglect or *laches* of the party moving, they will refuse the motion. It is always heard with caution and hesitation. It may be often brought forward upon a mere pretext, and naturally leads to perjury after the strength of the adverse party is known.

It has been urged, that the trees marked on the lines of the plaintiff's survey have been blocked, and their growths in no instance correspond with the alleged time of survey. The court upon the argument refused to receive this evidence; because it being clear, that disproving the alleged time of survey in the return was of great moment in the cause, the defendant ought to have been prepared to shew such blocks on the trial; he shall not avail himself of such negligence on his part.

The same remark applies to the field notes of *Lyon*, whereby it appears, that the lands in question "*were sur-*" *veyed for* Wm. Carothers' *heirs and* E. Blaine, *in dispute;*" though the official return specifies, that the survey was made on the order of *Byers*.

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The field notes were in the possession of *Lyon*, and used on the motion for the new trial before the Chief Justice. The immediate matter of inquiry naturally led to a demand of the field notes, which if overseen at the trial cannot now be urged as the ground of a new trial.

But the two papers now produced strike me in a different point of view. The first is an indorsement on the original order of survey directed to *Samuel Lyon*, "executed *November* "8th 1787." The figures are written on erasures. Instead thereof the figures 1798 appear to have been originally written, and are still distinctly visible.

The second is a protracted draught of several surveys laid down together on the 18th *November* 1791, for *Wm. Carothers*, found in the office of Mr. *Ramsay* the deputy surveyor of the district, who succeeded Mr. *Lyon*, which contains a marginal memorandum of its interference with other surveys specially noted. A similar draught was shewn on the trial without date. It has been contended, that if the survey was really made for *Byers* in 1787 it would have been noted in the margin of the large draught made in 1791 with the other interferences.

The question then is, can neglect or *laches* be reasonably imputed to the defendant in not producing these two papers on the trial? Would it occur to any one to examine the original order of survey to determine whether the time of survey as returned, was antedated? Could it be supposed, that the execution of the order would create suspicion of the order itself? Would a person be led to examine the office of a district surveyor, to search for draughts of private surveys, said to have been made without authority?

I am compelled to answer in the negative in both instances, and therefore I cannot ascribe negligence herein to the defendant. There can be no danger of perjury in suffering papers in the handwriting of Mr. *Lyon* the witness, who is now deceased, to go to another jury. It is not for me to point out the effect such testimony would have on the minds of intelligent and conscientious jurors. I abstain from making remarks, which might prejudice the merits of the cause on another hearing. I content myself with observing, that the

two papers relied on are of some weight, and in order to arrive at a full knowledge of the case, ought to be taken into consideration by another jury. It appears to me, that there are reasonable grounds to suppose that justice has not been done, that the case has not been heard on a disclosure of all the facts, and that it demands reconsideration.

It may possibly be said, though it was not urged by the plaintiff's counsel in the argument, that the reasons I have given were not contended for by the defendant's counsel in the court below. I promptly answer, they could not insist on grounds which they knew not at the time, and that *laches* could not reasonably be imputed to them in this particular. I have explicitly stated, that should this negligence be justly ascribed to *Carothers*, he could not succeed on the present motion; but that the matter strikes me differently as this case stands. The Circuit Court is an emanation from this court, and under the act of 20th *March* 1799, 4 *St. Laws* 562, the Circuit Courts were established in all the counties in the state except *Philadelphia*, and came in as a substitute for the courts of *Nisi Prius*. In *Kennedy* v. *Lowrey*, 1 *Binn.* 398, it is expressly stated by the Chief Justice, as the opinion of the whole court, that the judge, who tried the cause reports the evidence as if the trial had been at *Nisi Prius*, and that the object of the change was to make the administration of justice as convenient as possible, by bringing not only the trial, but all the proceedings (the judgment included) to every man's home. In that case, which was tried before me at *Meadeville*, entire damages were given in slander, wherein the declaration contained five counts, one of which was said to be bad, the words laid therein not being actionable. The court directed judgment for the plaintiff to be entered on the good counts, though the same had not been asked for in the Circuit Court. If the present evidence had been urged and verified to the Chief Justice, upon the motion for the new trial, I think, though I speak diffidently, he would have had little hesitation in granting the motion. I consider that every thing is open upon appeals to this court from the Circuit Court, and that this court will do what the Circuit Court would have done, on the same matter appearing to the judge presiding there. Why, when new merits are disclosed, which

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the party complaining has obtained knowledge of by mere accident, (if I may so express myself) shall we change the possession, and turn him round to a new ejectment? Why should we thus needlessly augment the field of litigation?

There is no dearth of authorities on this point. I can recapitulate four. In *Dunning's Lessee* v. *Carothers*, tried at *Carlisle* before Judge *Smith*, and a verdict for plaintiff, a new trial was awarded, on the deposition of *James Smith* esq. taken after the trial. In *Mitchel's Lessee* v. *Ritchell*, tried here before Judge *Smith* and myself, the plaintiff failed in deducing the title down to himself; upon an appeal, the court granted a new trial upon the deposition of *Robert M'Culloch*, produced to this court, curing that defect. In *Waln* v. *Wilkins et al.*, tried before all the judges of this court in the city, the deposition of *Alexander Scott*, who had not attended the trial, had great weight in inducing the court to grant a new trial, and justice was finally done to the satisfaction I believe of every honest mind. And in *Ross's Lessee* v. *Cutshall*, tried at *Bedford* before Judge *Brackenridge* 10th *October* 1806, and reported in 1 *Binney* 399, a verdict passed for plaintiff. On the appeal the deposition of *Thomas Stewart* was read, and had great influence in determining the minds of the court, that the land surveyed under the *Maryland* warrant did not answer the description in the warrant. 1 *Binney* 403.

Upon the whole, I am of opinion that the judgment of the Circuit Court be reversed, and a new trial awarded, upon the defendant's paying the costs of the former trial.

BRACKENRIDGE J. An appeal from the verdict of a jury and the judgment of a court before whom the cause was tried, to a court, who, from the fullest and most correct report that can be made of the evidence, can have but as it were the frontal bones of the evidence, without flesh, complexion, and expression, approaches near to an absurdity. And hence it is that the system of Circuit Courts which has been so happily abolished, has proved so vexatious to the suiters, irksome to the judges, and unpleasant to the counsel in the cause. Had the appeal been confined to matter of law, so that the verdict of the jury, and the judgment of the court upon it had been conclusive as to matter of fact, it would have been more tole-

rable. But even while it did exist, and yet exists in the shreds of it, that is, in the review of cases tried under it, I am disposed to restrain the consideration of the conclusions of the jury sanctioned by the court, on matter of fact, to something extremely obvious indeed. It would seem to me that an instance but rarely occurs if ever in the courts of *England*, where a verdict has been set aside on the ground of being against evidence, where in the opinion of the judge before whom the cause was tried at Nisi Prius, the verdict was according to the evidence.

In the case before us I am not clear from the report of the judge before whom the cause was tried, that there were grounds that would justify the granting a new trial; and had I been in the place of the judge, I do not know that I should have granted it. But on a verdict sanctioned by his judgment, I certainly should not.

But the application now is to hear evidence that was not before the judge; evidence which has been discovered since the trial, and which, had it been before him, would have induced him to grant a new trial. It is made on the ground of *surprise* on the part of the defendant, that the surveyor who was examined, did *not charge himself with a fraud* in returning a survey made as of a date prior to that at which it was made. It is to be noted also that the surveyor was called by the defendant to establish a fact, of which he must have had the suspicion that it did exist. I mean to say that it appears in the course of the examination that one of the facts which was expected to be brought out by the surveyor, was that of the actual date of the plaintiff's survey. It shews that he was aware of the possibility of an antedate in the return; and ought to have had at least the blocking of the trees made; and it cannot be said that he had not enough to put him upon inquiry as to the original location or order in the hand of the surveyor, or rough draught, or any other paper, even should it require the office to be swept to find it. I use this expression, because in fact the offices of deputy surveyors have been kept in a very loose way, and papers straggling from their proper place might be easily overlooked. But in contemplation of law they must be supposed to be kept with care, and every paper

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in its place; and that with due search the papers now discovered might have been found; especially by a party who would seem to have had a suspicion of the very fact of which they are thought to induce a presumption. The inconvenience of indulging such a latitude for new trial, and the applications it would bring upon us on the ground of after discovered testimony, that would explain or supply that given at the trial, strikes me as an insuperable difficulty in the way of looking at what is offered on the present occasion, so as to make it a ground of granting a new trial.

But this is not the only difficulty in the way. Are we in the place of the judge before whom the motion below was, to the same extent with himself, as to the hearing this evidence? Our judgment on the appeal, ought it not to go upon the same evidence which he had before him? At the first breaking of the case I had inclined to think we might take the latitude of examination we are called upon to exercise. But upon reflection, I am inclined to doubt the power of going so far.

The Circuit Court law provides, "that if any of the parties shall be dissatisfied with the judgment of the Circuit Court, on any motion for *a new trial*, that then and in such case, there shall be an appeal; but that no such appeal shall be available unless the counsel for the appellant shall state in writing his reasons for said appeal, and subscribe his name to the same, certifying his opinion that the same "are suffi- "cient in law to obtain a decision in favour of his client, and "not made for the purpose of delay." The decision of the court above is to be certified and remitted to the Circuit Court, to be carried into execution.

It is an appeal from the judgment of the Circuit Court, that is to be made, and which is to be confirmed, or *reversed*, and this reversal cannot but be referred to the reasons filed, and which are of *record in the cause*. It must be taken to be at least on some of the *grounds alleged* that the reversal goes. The solemnity of subscribing names to the reasons filed, gives this part of the record a peculiar importance, and cannot be laid out of view. The *probata* and the *adjudicata* here must agree. I am not able to distinguish, and to say that we have a greater latitude on the appeal on matter of law or fact, than we have on a writ of error on matter of law. If we

put ourselves, in the place of the court below, it can only be as to the evidence before them. We must be confined to the reasons filed as strictly as on plea pleaded we confine the evidence before a jury. I doubt our power to go out of the reasons; and having this doubt, I am unwilling to exercise the authority. The suiter might have reasonable ground to complain of injustice, in the delay given. The defendant losing possession, can bring an ejectment in his turn, and recover for mesne profits, if on another trial he shall be found to have the best title.

I do not see that we can, for the cause now shewn, and which can make no part of *the record*, though it might of *a report*, reverse a judgment given under an act of the legislature, which gives a special power on the appeal, and it would seem to me cannot be extended to embrace this case under the idea of a liberal construction. I am not clear that we could admit a statement of the evidence now offered, to be put upon the record collateral to the reasons filed, or in addition to them; and if we did, and the judgment was reversed, it would appear that it was not upon the reasons filed under the act, but upon reasons as in the court below *upon common law authority*. I am aware that depositions are said to have been heard to contradict or supply evidence which had been before a jury, and that upon this, judgments of the Circuit Court have been reversed. But of this I believe the correctness has never received examination; and if in any case it has taken place, it would seem to have been fallen into from what has been done under the Nisi Prius courts, and may be still done under the Nisi Prius court in *Philadelphia*, in which case no judgment given will have a reference to reasons filed as a ground of the motion for a new trial. What has passed *sub silentio* in practice, is very distinguishable from what has received the solemnity of a consideration on argument, and the sanction of decision. I incline therefore to refuse to hear the testimony offered, and to affirm the judgment.

The court being thus divided in opinion,

Judgment affirmed.

1810.

Chambersburg, Tuesday, October 2.

3b 114
5a 253
11s 341
3m 310

Lessee of Cox *against* Cromwell.

The owner of a prior warrant and survey upon which the purchase money is paid, is not barred either in law or equity from recovering in ejectment, notwithstanding there has been a decision against him by the board of property in consequence of his neglecting to attend the hearing upon a caveat, and he has lain by *fifteen* years after that, during which the party in whose favour the caveat was decided, has paid his purchase money, obtained a patent, and made improvements on the land. Although the owner of such warrant and survey may relinquish the land, yet when the purchase money is paid, these circumstances are not sufficient evidence of relinquishment. The omitting to take actual possession of the land, is no evidence of it, nor can the delay to bring an ejectment be a bar, if it be for a length of time less than that prescribed by the act of limitations.

THIS was an appeal from the decision of *Brackenridge* J. at a Circuit Court for *Huntingdon* in *June* 1808.

It was an ejectment for a tract of land on *Aughwick Creek*, in the county of *Huntingdon*, which the plaintiff claimed under a warrant of the 31st *May* 1762 for 200 acres to *George Alway*, and another of the same date to *Nathaniel Parker* for the same quantity, upon both of which the purchase money in part was paid to the receiver of the proprietaries on the 16th *June* 1762, a survey made upon the land in question on the 8th *June* 1765, and a return into office on the 23d *August* following. On the 19th *June* and 26th *July* 1762, *Parker* and *Alway* respectively conveyed to the plaintiff.

The defendant's title commenced with a deed from *George Croghan*, the proprietaries' agent for Indian affairs, dated the 14th *May* 1754, to *Casper Devebach* and others, who in 1755 and 1767 assigned to *John Switzer*. This deed recited a grant to *Croghan* by the *Six Nations of Indians*, of a tract situated on *Aughwick*, and conveyed 1000 acres of it for a valuable consideration to the grantees. On the 15th *Dec.* 1766, *Switzer* entered in the land office two applications for 200 acres each, covering the premises in the ejectment, upon which surveys were made on the 24th *June* 1784. He had previously, on the 5th *May* 1767, filed a caveat against any survey or surveys made for *William Trent*, or any other person claiming under him, or who held in trust for him, or whose names he made use of to cover lands for him on a piece of about 1000 acres called *Clark's* bottom, and below on *Aughwick* &c. alleging that he, *Switzer*, claimed the land in question by deed from *Croghan* prior to any person. This caveat was heard before the board of property on the 2d *May* 1785, a day which had been fixed with the consent of *Cox*, who was a party to the proceedings, but failed to appear; and upon this hearing, the board decided in *Switzer's*

favour, stating that it appeared to them that *Switzer* claimed under an application of the 15th of *December* 1766, that he also claimed the same by purchase from *George Croghan* in the year 1754, that he had made improvements, paid taxes, and been in possession of the land many years. Three days after this decision *Switzer* paid the purchase money, and on the 7th of *May* 1785, obtained patents for both his surveys. The ejectment was brought to *January* term 1800, up to which time *Switzer* had remained in possession.

His honour Judge *Brackenridge* charged the jury, that there was no evidence of any title to *George Croghan* from the *Six Nations*, the recital in his deed to *Devebach* and others not being evidence of that fact; and if *Croghan* had received a deed from the *Six Nations*, or any other nation of *Indians*, it would have been void, as it would have been in violation of law. That deed therefore and all operation of it were to be laid out of the case. The defendant's title must rest upon his application and possession, and upon the abandonment of the plaintiff. Considering the war, and the impediments in the way of judicial proceedings, he did not think the right of the plaintiff could be considered as abandoned at the time of the decision of the board of property; but it was a lying by, which he could not avoid coupling with the lapse of time after the decision, to raise an equitable consideration in favour of the defendant. The decision of the board, his honour said, was not final; nor did the law declare that it should be of no consideration. It was not however the weight of this decision upon which he laid stress, it was the plaintiff's declining to prosecute the claim before the board, suffering the defendant to pay his money, and lying by fifteen years after, while the defendant or those who held under him were improving the land. These circumstances established an equity for the defendant, which ought to protect him. The legislature in instituting the board, spoke of imperfect titles, which must refer to the title short of a patent. His honour considered the title short of the patent, as something short of a legal title, strictly speaking, and as coming under the doctrine of agreements to convey. Here were before the board of property, before the vendors the com-

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monwealth who succeeded to the proprietaries, two equitable purchasers. The question was, who should have the legal title. The one declines appearing; the patent of confirmation is given to the other. The other equitable claimant lies by fifteen years. The person to whom the patent is given, goes on to improve. He has paid a large sum of money for his patent; shall he in this country lose the land? Principles of natural equity, moral reason, and public convenience, were against it. His honour therefore gave it as his opinion to the jury, that their verdict should be for the defendant.

The jury accordingly found for the defendant; and the judge refusing to grant a motion for a new trial, which was made upon the ground of misdirection in point of law, the plaintiff appealed to this court.

Duncan for the plaintiff contended that this charge was erroneous in point of law, inasmuch as a warrant and survey, with the payment of the purchase money, were not like the common case of an executory contract in *England*. If they were, a patentee selling to a purchaser without notice, would convey a good title, against an adverse warrant and survey. A warrant and survey are equal to a legal title in *Pennsylvania*, against all but the commonwealth, who have a lien for the purchase money. They are a legal title even against the commonwealth, if the purchase money is paid. They give the party a complete right to a patent. They are therefore not to be compared to a mere equity, which may be postponed to another equity according to the circumstances of hardship or negligence which may exist in the particular case; but they are to be governed by the rules which apply to all legal estates, and therefore no length of possession will prevail against them, except what will amount to a bar under the statute of limitations. The very circumstances however, which were said to create an equity in behalf of the defendant, shew that he has none. The proof that the plaintiff declined appearing before the board of property, is proof also that the defendant had *actual* notice of the plaintiff's title, in addition to the constructive notice by the return of survey. He also must be presumed to have known, that the decree of the board of property did not settle the

question of right; and under such a state of things, his paying the purchase money, immediately afterwards, and his making improvements, if any were made, which was not in evidence, were acts of rashness which never can raise an equity.

S. Riddle and *J. Riddle* for the defendant said, that as a new trial depended upon the discretion of the court, and was never granted where justice was done, or where it would be very hard upon the winning party to defeat him, according to the *Dutchess of Mazarine's Case* (*a*), *Smith* v. *Brampston* (*b*), *Reavely* v. *Mainwaring* (*c*), *Sampson* v. *Appleyard* (*d*), and many other cases, the court would not in the present instance support the appeal, even if there had been some error in the direction to the jury; for it was most obviously a hard case, a case in which the merits had been tried, and in which, if the plaintiff could make out any title, it must be upon strict principles of law. But in fact there was no misdirection. The most that can be said of a warrant and survey is that it is a *quasi* legal estate. It is so as to the form of remedy, because we have no court of equity; but it is an equitable estate as between the owner and the commonwealth, until confirmation by patent, and is so also in an indirect way as to all persons who contend adversely for the patent. The application to the state for a patent, is in effect an application for a specific performance of the contract contained in the warrant. The board of property is to order this specific performance, to one or the other claimant according to his title. No doubt their decision is not conclusive; but if there is any trifling, any concealment, any unfair play, the party guilty of it loses his right to a performance. *Hays* v. *Carroll.* (*e*) The other party is of course preferred to him. Now, when *Cox* had fixed upon the day for a hearing, it was unfair in him to decline attending. He should have shewn his title, to put *Switzer* on his guard. It was in truth a fraud to permit this man to pay his money, upon the belief that the contest was given up, and to encourage his continued improvement of the place, through the space of fifteen years, while he was lying by. A court of equity will go a great way

(*a*) 2 *Salk.* 646.
(*b*) 2 *Salk.* 644.
(*c*) 2 *Burr.* 1306.
(*d*) 3 *Wils.* 272.
(*e*) 1 *Bro. P. Ca.* 27.

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to relieve a party from the expense and injury to which by loss of witnesses and the like, such *laches* may expose him. It precludes the negligent party from the full benefit of the act of limitations. 1 *Fonbl. book* iv. *ch.* 27. *p.* 319.

The defendant's counsel also argued against the new trial upon the ground of merits.

Tilghman C. J. This is an appeal from the Circuit Court of *Huntingdon* county. The verdict was for the defendant in conformity to the charge of the judge before whom the cause was tried; and the plaintiff complains of an error in law in the charge.

To understand the matter, it will be necessary to give a sketch of the evidence. [The Chief Justice then stated the case at large.]

The judge of the Circuit Court was of opinion that *Creghan's* deed was of no validity, because it was not proved that he had any right to the land. He therefore gave it in charge to the jury, that the defendant's title must rest on his possession and the applications entered by him, and on the abandonment by the plaintiff of his claim to the land. He thought, that taking into consideration the war, and consequent obstruction of judicial proceedings, the plaintiff could not be said to have abandoned, prior to the decision of the board of property; although the length of time, during which the defendant or those under whom he claimed had been suffered to remain in possession before that decision, strengthened the equity of the defendant's case. But what appeared to the judge to be of very great consequence, was, the plaintiff's declining to prosecute his claim before the board, and suffering the defendant to pay his money, and lying by fifteen years after, while the defendant was improving the land. Under these circumstances, as neither plaintiff nor defendant had a perfect legal title at the time of the decision by the board of property, and as the plaintiff has not yet obtained a patent, he was of opinion, that the equity of the case was against the plaintiff, and the defendant ought to be protected in his possession. The judge added, that the principle on which he decided, was new, and had never within his knowledge been recognised by any judicial de-

cision, and it would therefore be agreeable to him that it should be brought before this court.

In the argument before us, it has been contended on the part of the defendant, that at all events there ought not to be a new trial, because, independent of the point on which the judge charged in his favour, a sufficient title was made out under *Croghan*. It is true, that if this court were satisfied from the whole evidence, that the plaintiff ought not to recover, they would not order a new trial, although there might have been error in the judge's charge. It would be improper to give a new trial, when the result must be the same as in that which has past. But I see nothing to satisfy me, that there was a good title under *Croghan*. The judge was of opinion that his title was good for nothing. If he had a title, it certainly was not proved on the trial. I therefore throw that part of the case out of the question. The principle on which the judge gave his opinion in favour of the defendant is of very considerable importance. Property to a vast amount, in this state, is held under warrant and survey, where the purchase money has been paid, and under application and survey where it has not been paid. I shall confine myself to the case before us, which is a warrant and survey with the purchase money paid. There was a time when such estates were considered as personal property. But for many years past, they have been regarded as real estate, and there has been no question but the plaintiff might recover on them in an ejectment. In the case of *Sims's Lessee* v. *Irwin*, the Supreme Court of the *United States* decided, that an estate of this kind, was in all respects the same as a complete legal estate. I cannot say, that there is a perfect legal estate without a patent. The commonwealth have a right to insist on the patent being taken out, and may recover in an ejectment if it is not done. But an estate of this kind is certainly stronger than that of a man, who has contracted for the purchase of land from a private person, and paid his money, but obtained no conveyance. In that case if the vendor sells to a third person who has no notice of the first contract, he shall hold the land against the first purchaser. But a survey *returned*, is legal notice, and will prevail against a subsequent patent granted to a third person,

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whether he had actual notice or not. The commonwealth cannot withhold a patent from the owner of a survey on which the purchase money has been paid, unless he has relinquished his title. Such relinquishment must be clearly proved, for it is in its nature an extraordinary act. Where no money has been paid, there may be many reasons which may induce a man to relinquish his purchase. But why should one give up land that he has paid for? The omitting to take actual possession of the land, is no evidence of relinquishment, because many persons take up land, with a view of letting it lie unimproved for many years. But there is said to be something more in the present case; the plaintiff has deceived the defendant by not appearing before the board of property, and by not bringing suit for fifteen years. If the plaintiff has committed actual fraud against the defendant, he ought not to recover. I will consider that matter presently. But the delaying to bring an action against a person, who was informed of the claim before he paid his money or made his improvement, cannot be a bar, if the delay was for a length of time less than that prescribed by the act of limitations. To say that it would, is to set up a limitation in contradiction to the law. If the plaintiff has been guilty of fraud, it is quite a different thing, and gives room for a defence on different principles. Let us see then what proof there is of fraud. The plaintiff did not appear before the board of property. There was no fraud in that. He staid away at his peril, and the consequence was a decree against him. This decree he knew, and the defendant ought to have known, was not conclusive. But the defendant thought proper to rely on it, and paid his money into the office *three days* after. The defendant probably went on to make improvements, although there is no evidence of any thing of consequence being done by him. But this was his own folly; because he had full notice of the plaintiff's claim, as appears by the caveat and proceedings before the board. I can perceive no evidence of actual fraud, nor any other ground for presuming fraud, than what arises from the delay in bringing an action. This appears to me to be negligence rather than fraud. But it is a negligence which the law permits, if not protracted beyond a certain period. The case then is reduced to this: The plaintiff had

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a title which was not barred by the act of limitations; he had been guilty of no actual fraud, and the defendant paid his purchase money and made his improvements with notice of the plaintiff's claim.

Under these circumstances, I think the plaintiff ought not to have been barred of his recovery. I am therefore of opinion that a new trial should be granted.

Yeates J. I have read with much care the opinion which has been delivered by the Chief Justice, and now express my concurrence therein. I will only add thereto, that should the verdict in this case be sanctioned by the court, we must in effect declare, that a man forfeits his title, however good, by not appearing before the board of property upon a caveat, though the adverse party is acquainted with his right: or that a time short of the period prescribed by the limitation act, shall operate as a flat bar to the plaintiff's recovery; to neither of which propositions can I possibly accede.

New trial awarded.

3b 121
5wh505

The Commonwealth *against* Crevor.

Chambersburg, Wednesday, October 3.

An agreement was made between two contending claimants for money in the sheriff's hands, that the sheriff should deposit the amount in bank until the question should be decided. The sheriff deposited it, but took it out again soon after.

Held, that the sheriff was bound to pay interest to the successful party, from the time the money was thus taken out of bank.

This was an appeal from the decision of *Brackenridge* J. at a Circuit Court for *Cumberland*, in *May* 1809, upon a case, which stated as follows:

Jacob Crevor the defendant, high sheriff of *Cumberland* county, by virtue of process from the comptroller general's office, levied on the real and personal property of *Alexander M'Keehan*, then treasurer of *Cumberland* county, and on the 6th and 7th of *January* 1797, sold the same to the highest and best bidder. On this process *Alexander M'Keehan* was in custody and discharged by the comptroller general. The money arising out of these sales after certain deductions, amounted to 1736 dollars and 40 cents. A question having been raised, whether *James Carothers* and *George M'Keehan* were intitled to this money, or the commonwealth, a written

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agreement, dated 23d *March* 1799, was therefore entered into between *Jared Ingersoll* and *Thomas Duncan*, which was in these words: "It is agreed by *Jared Ingersoll* on behalf "of the commonwealth, and *Thomas Duncan* counsel for "*James Carothers* and *George M'Keehan*, claiming the "moneys arising from these sales, that *Jacob Crevor* shall "deposit in his own name in the bank of *Pennsylvania* the "proceeds thereof as stated in this account, except the "judgment bond of *James Blaine*, for the sum of —— dol- "lars, which it is agreed *shall remain until the court deter-* "*mine between the claimants, and the moneys deposited in the* "*bank shall remain likewise subject to the decision of the* "*court on a case stated, or otherwise as may be agreed on.*" This question was decided in favour of the commonwealth, and a demand made upon *Crevor* in *March* 1805, and not before. *Jacob Crevor* did deposit the above money in the bank of *Pennsylvania* on the 23d *March* 1799, but except a balance of 146 dollars and 50 cents, it was taken out by him in *March*, *July*, and *August* 1799, *December* 1801, and *November* 1802, and the balance was taken out in 1807.

The question for the Circuit Court was whether the commonwealth was intitled to interest upon the moneys thus deposited by *Crevor*, and if so, from what period.

After argument his honour was of opinion that the commonwealth was intitled to interest upon the respective items from the time they were taken from the bank, the presumption being that the sheriff made use of the money. And from this decision the defendant appealed.

Duncan for the defendant said, it did not appear that the sheriff had not the money ready when he was bound to pay it, nor that he had made use of it; but if this were the case, still the question would be, whether when the principal is not demandable, interest accrues; and here the commonwealth consented not to demand the principal until the contest with *Carothers* and *M'Keehan* should be settled. She in fact suffered no damage, for she had agreed that the money should lie idle during the pendency of the dispute; and therefore the principle upon which interest is usually adjudged, does not apply. There has been no delay of payment, no refusal upon demand, no loss to the party claiming interest.

Gibson and *Watts* for the commonwealth answered, that the agreement, upon which alone a distinction could be attempted, was to be put out of view, because it had not been complied with. The commonwealth was willing to lose the use of the money, in order to get a complete security for it, and to receive it promptly when her right should be decided; but the defendant violated his agreement, and therefore he shall derive no benefit from it. If money is received by one for another, and retained without the consent of the owner, it carries interest. It is the same as money lent. *Rapelje* v. *Emory* (*a*), *Crawford* v. *Willing* (*b*), *Walker* v. *Smith* (*c*). This was precisely the defendant's case. There could however be no doubt, that *Crevor* had used the money. It was a violent presumption from his taking it out of bank.

TILGHMAN C. J. delivered judgment.

The defendant's argument is founded on a fallacy. He contends that interest should not be paid, because the commonwealth has suffered no damage; and to prove that no damage has been sustained, he relies on the agreement, that the money should be deposited in bank until it was decided whether the commonwealth was intitled to the principal. But the truth is, that the commonwealth has suffered damage by nonpayment of the money, to which it was intitled, and which was in the hands of the defendant; and the defendant does not pretend that interest would not have been recoverable, if the agreement was out of the question. But the defendant has broken the agreement; and it would be extraordinary indeed, if his case should be strengthened thereby. It is considered as settled that interest shall be recovered against a man, who receives the money of another, and holds it against his consent. Now in this case, the defendant has withheld and no doubt made use of the money of the commonwealth, not only against the consent of the attorney general, but in direct violation of his agreement to leave it in bank. He has destroyed the security which he agreed to give, thereby depriving the commonwealth of all benefit of the agreement, yet insists that he himself is to take advantage of it. This is con-

(*a*) 1 *Dall.* 349. (*b*) 4 *Dall.* 286. (*c*) 4 *Dall.* 389.

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trary to all ideas of justice. The commonwealth has the same right to interest, as if the agreement had never been made. The judgment of the Circuit Court must therefore be affirmed.

Judgment affirmed.

Chambersburg, Thursday, October 4.

JACOB STUDEBACKER and others *against* MOORE.

IN ERROR.

A judgment against three defendants, upon a submission to arbitration by one of them, is erroneous, and must be reversed as to all.

UPON error to the common pleas of *Bedford*, the case was thus:

The defendant in error brought an action against the three plaintiffs in error for killing his mare, to which they severally pleaded the general issue in *November* 1807. On the 4th of April 1808 he filed with the prothonotary a paper purporting to be signed by *Jacob Studebacker* and himself on the 2d of *March* 1808, and witnessed by *J. Todd*, agreeing to refer all matters in variance in the said cause, to certain referees; and upon the same paper there was a report in favour of *Moore* for 45 dollars damages, and costs of suit to be paid by the defendants. A copy of this report was served upon *Jacob Studebacker* on the 11th of *April*, and on the 4th of *June* the counsel of the plaintiffs in error filed two exceptions arising out of the face of the report—1. That it did not appear that the referees had been sworn agreeably to the act of 21st *March* 1806, nor that it had been dispensed with by the parties. 2. That the submission was by one of three defendants who had pleaded severally; and the report was against all. At *January* term 1809, the court were moved to strike off the entry of the report, upon the ground that the submission had not been duly proved by the subscribing witness; but the court refused the motion, overruled the exceptions to the report upon the ground that they had been filed too late, and gave judgment upon the report, on which execution issued against all the defendants.

S. Riddle and *J. Riddle* for the plaintiffs in error. This

judgment cannot be supported; it is in conformity neither with the act of assembly, nor with common law. The subscribing witness did not prove the agreement by his oath, according to the first section; the agreement was not made a rule of court, according to the second section, but the reference took place before the agreement was brought into court; and the third section has been violated in not administering an oath to the referees. *Act of 21st March* 1806, 7 *St. Laws* 558. At common law also the judgment is bad, because it is against three upon a submission by one.

Todd and *Dunlap* contra. No exception was taken that the subscribing witness did not prove the agreement, and *non constat* that he did not; but it was not necessary that he should, for the first section of the act applies only to controversies out of court, where no action is pending. Nor is it necessary that the agreement should be filed in the prothonotary's office and made a rule of court, before the referees act. The second section provides that the parties may *in vacation* consent to a rule of court; which shews that this act may be done, when no rule of court can be obtained, and that the material thing is the consent to the agreement's being made a rule of court, which may be done when the award is filed. The court were right in overruling the exception to the want of an oath by the referees, as well as the others, because they were not filed during twenty days after the award, which was made in term time. The legislature intended that an award should not be opened, after the time mentioned had gone by. If however the award is bad in consequence of its being founded upon a submission unauthorized by two of the defendants, at least the judgment is good against that defendant who submitted. The execution against all, we agree must be set aside.

In reply it was said, that the limitation of twenty days did not apply to exceptions appearing wholly on the face of the award. They might be taken at any time, in the same manner as to reports under the act of 1705. And that the judgment was erroneous even against the defendant who signed the submission, because the judgment was according to the award, and the award was that the money should be paid by the *defendants*.

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TILGHMAN C. J. delivered judgment.

Many objections have been brought forward to the regularity of entering the submission to arbitration in this case, and to the award of the referees. The opinion of the court is founded upon a single point. It appears by the record that an action of trespass having been brought against three defendants, and one of them only having entered into an agreement to submit to arbitration, an award was made and judgment entered against all three. The court of Common Pleas refused to enter into any consideration of exceptions to the award, because they were not filed within twenty days, as prescribed by the act of assembly, and they then proceeded to give judgment on the award. This judgment cannot be supported, because it is given against two persons who never consented to submit their case to arbitration. As to these two persons the whole proceeding was void from the beginning. They severally pleaded not guilty, and put themselves on their country for trial. The court had no authority to give judgment against them, till they had been found guilty by a jury. We are therefore of opinion that the judgment is erroneous, and must be reversed.

Judgment reversed.

DUNCAN and KEIFFER *against* KEIFFER.

IN ERROR.

Chambersburg, Thursday, October 4.

If a surety makes an agreement with one of two persons for whom he is bound, that if he the principal will pay one half the debt, he the surety will pay the other half for the other principal, and the one half is paid by the principal according to the agreement, the surety cannot maintain an action against both principals to recover the part that he has paid. The express agreement prevents the implication of a promise which the law would otherwise make against each principal to indemnify the surety to the whole amount that he should pay.

THIS cause came before the court upon a bill of exceptions by the plaintiffs in error, who were defendants below, to the charge of the president of the Common Pleas of *Franklin* county.

The plaintiff was bound as security for the defendants in a bond to a certain *Peter Groff*, who obtained judgment, and took him in execution upon a *ca. sa.* While in the hands of the sheriff he proposed to one of the defendants, *Duncan*,

that if he would pay one half of the debt, he the plaintiff, would pay the other half for *Keiffer* his brother, the other defendant. *Duncan* accordingly paid one half, and the plaintiff paid the residue, for the recovery of which the present action was brought.

Prior to this agreement, *Devalt Keiffer*, the defendant, had entered into an article of agreement with *Christian Keiffer* the plaintiff and two other brothers, by which he agreed to sell and convey to them certain lands at certain prices to be paid in a certain manner, i. e. 250*l.* to *D. Keiffer* senior, then they were to retain the money paid by themselves or either of them for him, or due to themselves from him, then to pay all unsatisfied judgments against him in *Franklin* county, and the overplus, if any, after paying themselves for trouble &c. to return to *D. Keiffer*.

The judge told the jury that they must first ascertain whether the plaintiff's promise to pay one half for his brother, was an absolute one, there having been some circumstances that gave it a different complexion. If absolute, then they were to consider whether he had at that time any money in his hands belonging to *Devalt Keiffer*, for if he had none, his promise was *nudum pactum*. By the article of agreement between the *Keiffers*, the money arising from the sale of the lands was specially appropriated; it was trust money, if any, in the hands of the three *Keiffers;* and *Christian's* right to call upon the defendants could not be annulled, and the trust defeated, by treating it as money in his hands alone. If there was any money due to *Devalt Keiffer*, it was due by all the trustees; and it could not be set off in this suit by *Christian* alone, against *D. Keiffer* and another; it therefore was not a sufficient consideration for the promise of the plaintiff, and should have no weight, whatever might be the amount of it. The defendants excepted to the charge, and the jury found a verdict for the plaintiff.

J. Riddle and *Duncan*, for the plaintiffs in error, argued, that the question had been put to the jury, partly upon an irrelevant and partly upon an erroneous point. The question was not whether *nudum pactum* or otherwise, for that question never arises where there is a performance, and here

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the plaintiff had performed the promise to pay one half for his brother; but it was whether the plaintiff could maintain the suit upon an implied assumpsit by *Duncan*, when he had made an express contract with *Duncan* upon the same matter, before he had paid any money, and of course before the law had raised any promise by implication. *Expressum facit cessare tacitum.* The law could not imply a promise by *Duncan* to pay *Keiffer* the whole, when *Keiffer* had made an express agreement with him to pay half, before as yet *Duncan* was bound to pay any thing. But the judge was wrong in saying that the amount of *Devalt Keiffer's* money in the hands of *Christian* and his brothers should have no weight. Surely if there had been enough to pay all *Devalt's* debts including this, it would have been a sufficient consideration for *Christian's* assuming to pay his brother's debt.

Orbeson and *Dunlop* for defendant in error. At the time of *Keiffer's* paying the moiety, *Duncan* was bound to pay the whole to *Groff*, and therefore his promise to pay half was a nullity. If at that time there had been no obligation by *Duncan*, the argument might have some force, that the express agreement superseded an implied one; but there was then an obligation to the whole extent of the debt, and a promise to meet part of it was of course idle. The question was then whether there was any consideration for promising to pay *Devalt's* moiety; for if there was not, *Christian* must be considered as paying for himself as surety, and not for his brother as principal, which leaves him in possession of all his remedies against both principals. Now there surely was no consideration. The circumstance of being a brother is nothing; and as to the trust money, whatever might have been its amount, *Christian Keiffer* had no right to apply any part of it in discharge of *Devalt's* debts paid by himself alone after the date of the articles of agreement; of course that money was not a consideration.

TILGHMAN C. J. delivered the court's opinion.

The plaintiff was bound as security for the defendants in a bond to *Peter Groff*. He was sued on this bond, judgment obtained against him, and a *ca. sa.* issued on which he was

arrested. While in custody of the sheriff under this arrest, it was agreed between the plaintiff and *M. Duncan* one of the defendants, that *Duncan* should pay half of the debt, and the plaintiff should pay the other half for *Devalt Keiffer* the other defendant, who was his brother. After this agreement *Duncan* did pay his half, and the plaintiff paid the other half. The question is, whether *Duncan* is liable for any part of the money so paid by the plaintiff.

If no agreement had taken place, the law would have implied a promise from both defendants to reimburse the plaintiff for all money paid by him on account of this bond. But before he paid any thing, he made the agreement, which leaves no room for the implication which the law would otherwise have made. It is said that the agreement is *nudum pactum*, because the plaintiff received no consideration. But the question is not whether the plaintiff could have been compelled to pay the one half of this debt for his brother. He has actually paid it, and now comes to recover it back from the defendants contrary to his agreement. This he cannot do. There was nothing hard or improper in the agreement. It placed the two defendants on the footing on which in equity they ought to stand with respect to each other, that is to say, each to pay half. And no one can say whether in consequence of this agreement, *Duncan* may not have made greater exertions to pay his half, and made the payment quicker than he otherwise would have done; for it is to be observed, that at the time of making the agreement, the plaintiff, having paid no money, could not have supported an action for money paid on account of the defendants.

The case is very much strengthened on the part of *Duncan*, from the circumstance of the estate of *Devalt Keiffer* having been assigned to the plaintiff and his two other brothers, for the purpose of paying his debts. It is true, it was appropriated in the first instance to the payment of certain debts, of which that in question was not one. But the surplus, if any, was to be restored to *Devalt*, nor do we know whether or not there was a surplus. If I understand the opinion of the court of Common Pleas, it was that this consideration should have no weight, whatever might be the amount of the property of *Devalt Keiffer* in the hands of his

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brothers. In this I think they were wrong; for although such matter might not be a subject of *set-off* against the plaintiff, yet certainly it would afford good ground for the plaintiff's assumption to pay his brother's debt.

On the whole we are of opinion that the judgment of the court of Common Pleas was erroneous and should be reversed. A *venire facias de novo* is awarded.

Judgment reversed, and
Venire de novo.

Chambersburg, Saturday, October 6.

SHEELER *against* SPEER.

IN ERROR.

A leading interrogatory must be objected to at the time it is put to the witness. If no exception is then taken by the opposite party, the answer of the witness to the leading question, cannot be opposed upon that ground, when his deposition is read upon the trial.

Notice of the time and place of taking depositions under a rule of court, should have convenient certainty. The bare mention of a house in a certain county is too vague, unless it is a place of public notoriety.

UPON a writ of error to the Common Pleas of *Franklin* county, the case was as follows:

The defendant in error brought an action against *Sheeler* for slander, in which the declaration alleged that he spoke the following words of the plaintiff, being an iron master, in a conversation concerning him as an iron master. "He" (the said *Speer* meaning) "will be broke up in a few days;" meaning that the said *Speer* was insolvent and unable to pay his debts; "and the hands" (the workmen and tradesmen meaning) "will get nothing for their work," (innuendo that the said *Speer* would defraud his hands of their just wages.) And in another conversation, &c. he spoke the following words of the plaintiff in his trade aforesaid, he the said defendant then being in the service of the said plaintiff, and having the superintendence of the said plaintiff's furnace. "I" (himself meaning) don't care the devil had the furnace" (the plaintiff's furnace meaning) "if I had my money" (meaning a debt contracted by the defendant with the plaintiff.) "I "am afraid I never shall get my money. *Speer* will soon be "broke up, and you (the said workmen, &c. meaning) are all "working for nothing, &c."

Upon the trial of the cause the plaintiff offered in evidence the deposition of a certain *Richard Dean*, taken before a jus-

tice of the peace, agreeably to a rule of court. The first part of the deposition stated that *Sheeler* upon a certain occasion asked the witness, who was a filler at *Speer's* furnace, how many baskets of ore were on; he answered fourteen. *Sheeler* ordered him to put two more on. The witness objected that the furnace was already too high. *Sheeler* told him to do as he was ordered, "and drive her to hell, for he expected to be the owner of her in a short time." Then followed these interrogatories by the plaintiff.

1st. Did you not hear Mr. *Sheeler* say that he did not care the devil had the furnace, if he had his money, but that he was afraid he would never get his money?

Ans. Yes I did.

2d. Did you hear Mr. *Sheeler* say, that in a few days Mr. *Speer* would be broke up, and that they were all working for nothing?

Ans. Yes I did.

3d. Was it before you had made the promise against drinking spirits or after, that you heard Mr. *Sheeler* express himself in the manner you say?

Ans. After I had made the promise.

To these succeeded certain interrogatories by the defendant, and the answer of the witness.

The defendant's counsel objected to reading the answers to the first and third interrogatories,* because the questions were leading; but the court permitted them to be read, and sealed a bill of exceptions.

The defendant then offered in evidence the depositions of *John Gresson* and *Peter Debow*, taken *ex parte* under a rule of court, and the following notice. "*Speer* v. *Sheeler:* "Sir, take notice that the depositions of witnesses will be "taken in this cause at the house of *Thomas Fannegan* in *Bed-*"*ford* county, on the twentieth day of this month, where you "may attend if you think proper. *John Sheeler*, 4th *Feb.* "1807. To Mr. *James Speer*." To this the plaintiff's counsel objected, upon the ground that the notice had not been sufficiently certain; and of that opinion were the court, who overruled the evidence, and sealed another bill of exceptions.

* It is probable that the *second* interrogatory and answer were the object of exception instead of the *third*, as no objection was made to the latter upon the argument in this court.

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Brown and *Dunlop* for the plaintiff in error. There can be no doubt that the first was a leading question, and therefore an illegal one; and the magistrate was not to decide whether it was so or not. The party is always intitled to take the answer before the magistrate, and when it comes before the court, they decide in the first instance. The whole deposition was exceptionable. The witness begins by stating an attempt to injure the furnace, which was in no way pertinent to the slander; and after that his answers are merely an echo to the interrogatories.

The notice which intitled the defendant to read *Gresson's* deposition, had convenient certainty. Nothing more is necessary. *Fannegan* was a justice of the peace, and might have been found upon the least inquiry. But the defendant did not shew that any inquiry was made, and therefore he shewed no inconvenience from the notice. To require the township, or the distance from some notorious place, might be a source of great vexation; it might be impracticable to bring home knowledge to the opposite party.

Watts and *Duncan* for the defendant in error. The first part of *Read's* deposition was read without objection; and it cannot now be the subject of remark. The first interrogatory too and the answer were proposed and received without any exception at the time; and it therefore was not competent to the defendant to except to them after the deposition was finished. Had an objection been taken before the witness was discharged, the question might have been varied, or waived altogether. To permit it now, would be to expose parties perpetually to surprise; and it would countenance one of the parties in preparing a snare for the other. The third interrogatory certainly contains nothing improper.

County is a much too general description. At least the township should be indicated, to prevent occasion from being taken by this loose sort of notice, to elude inquiry, and to get possession of *ex parte* testimony. Notice of the execution of a writ of inquiry, should specify even the sign of the house, and that it will be executed between two certain hours. *Arnold* v. *Squire* (*a*); 1 *Esp. Dig.* 171. Here the whole day is men-

(*a*) *Sayre* 181.

tioned; and unless the plaintiff was present all day, still he might be baffled. This would open a great door for fraud. The notice does not say that *Fannegan* is a justice of the peace; on the contrary, the usual title of that magistrate is omitted.

TILGHMAN C. J. In this case there are two bills of exceptions. The first was to part of the deposition of *Richard Dean*. The bill appears to have been drawn in great haste, and is not as intelligible as could be wished. I shall adopt the construction put upon it by the counsel for the plaintiff in error, which is, that the only parts excepted to, were the first and third interrogatories and the answers to them. If that part of the deposition which precedes the interrogatories had been excepted to, I should have had great doubt on it; because it seems to have led to the disclosure of matter, which may be the subject of another action.

The objection to the first interrogatory is, that it is a leading one. I do not think the question was properly put; but the defendant should have objected to it at the time; he was present and cross-examined the witness. If it had been objected to, it might have been waived. It was too late to make the objection at the trial.

As to the third interrogatory, and the answer to it, there is nothing improper in either. I need say nothing on that subject, as nothing has been said in the argument.

The second bill of exceptions was taken on the rejection of the depositions of *John Gresson* and *Peter Debow*. They were rejected, because the notice of taking them was not sufficiently certain. It only mentions that they were to be taken on the 20th *February*, "at the house of *Thomas Fan-* "*negan* in *Bedford* county." This is certainly a very vague description of time and place. I am not for tying up the party to unnecessary strictness. It is usual to mention certain hours, between which the deposition is to be taken. I give no opinion however on that defect. But it appears to me, that the bare mention of the *county* is too loose a description of place. If the township had been mentioned, or any place of notoriety in the neighbourhood of which the house was, where the deposition was to be taken, it might have done.

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As the taking of depositions is a great accommodation to the party, whose witnesses are examined, it may reasonably be insisted on, that he should give such notice, as may enable his adversary to find the appointed place, without extraordinary trouble. I cannot say that the court of Common Pleas were wrong in rejecting these depositions.

Upon the whole case, my opinion is, that the judgment be affirmed.

YEATES J. It is a satisfactory answer to the objection now made to the leading question proposed to *Dean* the witness, that it was not taken at the time; and so also as to what passed respecting the overloading of the furnace. If the judge on being appealed to, had declared that the latter conversation was evidence in this cause, I should have thought it erroneous; for another suit might be brought for this act, and damages would thus in such a case be twice recovered for the same misconduct.

I know of no other general rule, which has been adopted as to the form of a notice to take depositions, except this, that it should contain *convenient certainty*, as to the time and place of taking them. Different gentlemen practise with more or less precision in this particular. The court will not expect the same exactness in these cases, as in a notice to attend the execution of a writ of inquiry of damages; but they will avoid a laxity, which may tend to defeat the benefit of a cross-examination by the adverse party. The notice on the face of it should be sufficiently correct, to inform the party *when* and *where* he should attend, without hunting through a whole county for information.

I consider the notice of the 4th of *February* to attend *at the house of Thomas Fannegan in Bedford county* on the 20th *February*, as too loose. It does not appear, that this house was a place of public notoriety; on the contrary, it is admitted, that *Fannegan* was a newly created justice of the peace, and *esquire* was not added to his name. The uncertainty is augmented by the notice of 1st *February* to take depositions before *Amos Evans esq.*, without naming any place, on the same 20th of *February*.

I concur that the depositions were properly overruled in

evidence, and that the judgment of the court of Common Pleas of *Franklin* county be affirmed.

BRACKENRIDGE J. I concur in the opinion of the Chief Justice in all respects.

Judgment affirmed.

3b 135
1sr 479
12s r 253
15s r 78
1r 293
2r 123
2r 325
2w 150
4w 19
8w 75
9w 498
6wh 474
8ws 106
4 34
13 612
22 40

MURRAY *against* WILLIAMSON Administrator of GRAY.

IN ERROR.

Chambersburg, Saturday, October 6.

BILL of exceptions to the opinion of the Common Pleas of *Cumberland* county.

The action was covenant upon an indenture of lease, to recover rent in arrear at the death of *Gray* the plaintiff's intestate. The defendant *Murray* pleaded covenants performed, and *payment;* and on the trial of the cause, after proving that in the lifetime of *Gray*, he, the defendant, had in his possession as his property, a certain single bill under the hand and seal of *Gray* executed to one *John Conolly*, and by him assigned in the presence of one witness to the defendant, he offered to give the bill and assignment in evidence under the plea of payment, as an answer *pro tanto* to the plaintiff's claim. But this evidence being objected to, was overruled by the court, and the defendant tendered a bill of exceptions.

Duncan for the defendant in error, cited *Hutchinson* v. *Sturges* (*a*), *Shipman* v. *Thompson* (*b*), *Whitaker* v. *Rush* (*c*), *Bull. N. P.* 179. *Cramond* v. *The Bank of the United States* (*d*), 1 *Selw.* 138.

Watts for the plaintiff in error.

TILGHMAN C. J. *Murray* was indebted to *Gray* in his lifetime for rent. He had also in his possession a single bill

If the defendant has an equitable demand against the plaintiff, as for instance a bond given by the plaintiff to a third person, and by him informally assigned to the defendant, the court will permit him either to set it off against the plaintiff's demand, or give it in evidence under the plea of payment. It is not essential to a set-off that the defendant should be able to sue for the demand in his own name.

There is nothing in the defalcation act of *Pennsylvania* to exclude a set-off either by or against an executor or administrator. On the contrary that act has been uniformly construed to admit it.

(*a*) *Willes* 264 *note.*
(*b*) *Willes* 103.
(*c*) *Ambler* 407.
(*d*) 1 *Binn.* 64.

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from *Gray* to *John Conolly*, assigned to him during the life of *Gray* in such a manner as to give him the complete equitable property; but it was not assigned according to the act of assembly, so as to enable him to bring an action in his own name. This action was brought to recover the rent, and the defendant under the plea of payment with leave &c. offered to give the single bill in evidence, which was rejected by the court, and on this the bill of exceptions is founded. The plaintiff in error contends that the evidence was admissible, either as a discount, or as an equitable defence, on which he would have been relieved in a court of Chancery. The counsel for the defendant in error, in the opening of his argument, denied that under our act of assembly, there can be a defalcation, when either of the parties is an executor or administrator; but he did not persist in it, and certainly, the construction of the act has been uniformly to the contrary. This objection therefore is out of the question. If the single bill had been assigned in the presence of two witnesses according to the act of assembly, the defendant might certainly have availed himself of it, by way of defalcation. I see no good reason why he may not do it, as it is. It is stated in the bill of exceptions, that the single bill was the property of *Murray*. The case is much stronger in this court, than in the *English* courts of common law; because here an equitable defence is pleadable. But even the courts of common law have recognised the equitable owner of a chose in action, though the action was brought in the name of another for his use. In *Winch* v. *Keeley*, 1 *D.* & *E.* 619, where the plaintiff was a bankrupt, the court sustained the action for the use of another person, to whom the plaintiff had made an assignment of a chose in action prior to his bankruptcy. In *Rudge* v. *Birch*, *Mich.* 25 *Geo.* 3. *K. B.* cited 1 *D.* & *E.* 622, the action was debt on bond, the defendant pleaded that the bond was given to the plaintiff for the use of *A*, for a debt due from the defendant to *A*, and that *A* at the time of the action brought was indebted to the defendant in more than the amount of the bond; held a good plea on demurrer. The same principle was established in *Bottomley* v. *Brooke*, cited 1 *D.* & *E.* 622. It appears by some of the cases cited on the part of the defendant in error,

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that the debt sued for, and the debt set off, must not be in different rights. For instance, if the plaintiff sues as executor, the defendant cannot set off a debt due to him from the plaintiff in his private capacity, or *vice versa;* but that is not the present case. Here the plaintiff sues as administrator; and the debt offered to be set off, is due from the plaintiff's intestate. Both are in the same right. But it is immaterial to the defendant, whether he avails himself of this defence by way of defalcation strictly speaking, or on the ground of equity. It would be against equity, that the defendant should be compelled to pay this debt; when there is a debt due to him in equity from the plaintiff's intestate. It not only subjects him to the expense and delay of a new action, but possibly to the loss of part of his demand, in case of a deficiency of assets. I shall gladly embrace every principle which prevents multiplicity or circuity of action. Justice is done to the plaintiff, if he receives what is due to the estate of *Gray* from the estate of *Murray*, deducting all legal or equitable debts due from the estate of *Gray* to the estate of *Murray*. I am of opinion therefore, that the evidence offered by the defendant was improperly rejected, and the judgment of the court of Common Pleas should be reversed.

YEATES J. There is no ground for alleging, that set-offs cannot be established in suits brought by executors or administrators. It has been done repeatedly; and it cannot be objected thereto, that it disturbs the due course of administration of the estates of decedents, because the sum really due at the death of the party is the true balance, 1 *Binn.* 64. But it is clear, that a person indebted at the time of the death of the party, cannot buy in afterwards for the purpose of set-off, a debt of inferior dignity, which would be excluded from payment on a legal distribution of assets; for this would disturb the course of administration.

I admit that the debt, intended to be set off, must be claimed in the *same right* as the debt demanded. But that objection does not occur in the present instance. *Williamson* claims the debt as administrator of *Gray;* and the counter-claim against him is in the same character.

It has been contended, that to enable a man to make a

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set-off, he must have it in his power to sue in his own name. It lies on the defendant in error to establish this position, which seems to militate against the first principles of justice. It has been observed by a law judge, that though a chose in action cannot strictly be assigned, a court of law would take notice of a trust, and consider who is beneficially interested. 1 *T. R.* 621, *Winch* v. *Keeley*. Besides, even admitting that this set-off could not be gone into from the strictness of law, yet a court of equity would grant relief in any case, where there is an equitable without a legal right to set-off. 5 *Vez. jr.* 108, *James* v. *Kynnier*. Equity forms a part of our law; and we should be authorized to extend the remedy in a case like the present.

I am of opinion, that the judgment of the court of Common Pleas of *Cumberland* county should be reversed, and a *venire facias de novo* awarded.

BRACKENRIDGE J. In the lifetime of *Samuel Gray*, in whose right the plaintiff in the original action sues the defendant in that action, the now plaintiff *Murray* had in his *possession as his property* a certain single bill under the hand and seal of the said *Samuel Gray*. This I take to be the single criterion necessary to intitle to set-off, *the having a property* in a demand originally owing to one's self or accruing in right of another, and its being between the same persons or their representatives by whom and against whom the demand on either side may be made.

An exception is stated of a debt due to the husband in right of his wife as that which cannot be set off in an action against him on his own bond; and also of a debt of his wife's *dum sola*, which cannot be set off against a claim made by the husband alone, unless after marriage he makes the debt his own. I cannot see the reason of this; and therefore I deny it to be law. The husband has a property in the debt due to the wife though of a special nature, so that unless he reduces it to an absolute ownership, it will survive to the wife; but he may reduce it, and if he choose to exercise an ownership over it by a set-off, what can hinder him? Where he is liable as the husband for the debt of the wife, what hinders to set off such demand against any claim on his part? It prevents multiplicity of

action, it involves no inconvenience, and is a construction according to the spirit and intention of the statute of defalcation or set-off. If *British* judges narrow the construction of their act, it is no reason that we should narrow ours, which is in terms more extensive. But it is not necessary to be more extensive than even the *British*, in my opinion, to justify the set-off in the case of the wife's debt, or demand. There would seem to be in the *Law Tracts*, *Buller's N. P.* and *Montague on Set-offs*, a reference to some post-revolutionary cases to the contrary; but these are *Nisi Prius* cases; and if they were bench cases they would not be conclusive. Decision is but evidence of principle; and the appearing to be against reason must weaken this evidence. So that I do not see that even this exception ought to be considered as existing in the way of the general principle of the right of set-off, where an interest exists in the thing set off that would intitle the party to recover whether directly in his own name, or in the name of another for his use. On these grounds I am clear the set-off ought to have been allowed, and that the judgment ought to be reversed.

Judgment reversed.

3b 139
1sr155
1sr156
3sr446
9sr336
9sr351
9sr365
13sr 70
10w182
3g 171
2 431
16 108
26 339
28 103
31 98
33 93
37 21
49 54
49 55
49 58
49 59
63 484
63 487
78 42
78 43
91 514
99 532
118 107

Lessee of FINDLAY and others *against* RIDDLE.

Chambersburg, Saturday, October 6th.

THIS came before the court by appeal from the decision of the Chief Justice at a Circuit Court for *Franklin* county in *June* 1807.

A devise to *A* during his natural life, and "after his decease, if he "shall die leaving lawful issue, *to his heirs* "*as tenants in* "*common, and* "*their respective* "*heirs and assigns for ever;* "but in case he "shall die without leaving "lawful issue, "then to *B*, "the brother of "*A*," is only an estate for life in *A*

The lessors of the plaintiff who were the children of *John Findlay* the younger, deceased, claimed the premises in the ejectment under the following devise in the will of their grandfather *John Findlay* the elder, who, it was admitted by both sides, died seised in *October* 1783.

"I give and bequeath to my son *John Findlay*, all that "plantation and tract of land whereon I now dwell, situate in "*Letterkenney* township and county of *Cumberland*, bounded

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" &c. containing 400 acres with the usual allowance, &c. to " hold to him the said *John Findlay*, *during his natural life*, " subject to one full third part of the yearly rents and pro- " fits thereof herein bequeathed to my wife and payable to " her yearly and every year during her natural life, together " with her other privileges as aforesaid; *and after my said son* " *John's decease*, *if he shall die leaving lawful issue*, I give " and devise the same plantation and tract of land *to his* " *heirs as tenants in common*, *and their respective heirs and* " *assigns for ever*. *But in case my said son John shall die* " *without leaving lawful issue*, I give and devise the same " plantation and tract of land to my son *James Findlay*, to " hold to him his heirs and assigns for ever."

John Findlay the son, on the 26th of *October* 1799, in conformity with the act of 16th *January* 1799, " to facilitate " the barring of entails," executed and acknowledged in open court a deed of the premises to the defendant, expressed to be with intent to bar his estate tail therein; and on the same day the defendant reconveyed. On the 23d *January* 1801, *Findlay* and wife by articles of agreement with the defendant, granted and sold him the premises, under which articles the defendant received possession in the lifetime of *John*, and now claimed to hold it against his children.

The single question was, whether *John Findlay* took an estate tail, or merely for life.

Upon the trial of the cause, the Chief Justice told the jury that the inclination of his mind was rather in favour of the opinion that *John Findlay* took only an *estate for life;* but as it was a question of considerable difficulty, he would reserve the point; and if on mature reflection he should think that *John Findlay* took an estate tail, a new trial would be granted in case a verdict should be found for the plaintiff, as he thought it ought to be.

The jury accordingly found for the plaintiff; and after argument upon the point reserved, which took place before the Chief Justice on a motion for a new trial, he delivered his opinion against the motion as follows:

Nothing can be more clear than that the testator meant to give his son *John* an estate for life only; not solely be-

cause he has expressly said so, but because the fee simple which he has devised to his heirs, (that is, his issue or his children) is inconsistent with *John's* taking an estate of inheritance. The issue are to take as tenants *in common*, which they could not do, if *John* took an estate in tail. The intent was, that on *John's* death the estate should go immediately either to his issue in fee as tenants in common, or in case there was no issue, then to his son *James* in fee. It is a contingency with a double aspect, very like the case of *Luddington* v. *Kime*, 1 *Ld. Ray.* 203, and that of *Docking* v. *Dunham*, *Doug.* 251. It is true, that although the testator intends to give an estate for life, yet if the main and general intent is to give other estates inconsistent with an estate for life, there, the particular intent, being of less importance, shall give way to the general intent. As where there is a devise to *A* for life, remainder to his issue as tenants in common, and for default of such issue, remainder to *B* in fee; *A* takes an estate tail, because the main intent of the testator was, that *B* should take nothing, until there was a failure of the issue of *A*. But if *A* took an estate for life only, his issue would take for life only, there being no words to limit the inheritance to them, and on the death of each of the children his share would go over to *B*, while the rest of *A's* children were living, or even while issue of the deceased child was living; and thus the principal intent of the testator would be defeated. Upon this principle all the cases cited by the defendant's counsel turn; and therefore they are not applicable to the present case, where the intent to give a life estate to *John Findlay* is by no means inconsistent with the general intent of giving an estate in fee simple to his children as tenants in common. I am clearly of opinion, that the devise in question passed no greater estate than for life to *John Findlay*, and that the motion for a new trial should be discharged.

The question was now argued before this court by *Duncan* for the defendant, the appellant, and by *Watts* for the plaintiff.

Arguments for the defendant. An estate in fee-tail vested

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in *John Findlay* by the rule in *Shelley's case*, (*a*) 1 *Inst.* 376 *b. note* 1, there having been in the same gift or conveyance an estate of freehold to *John*, and a remainder limited immediately to the *heirs* of his body.

Nothing can prevent this conclusion, but the overthrow of the rule itself, by permitting a supposed intention of the testator to control the legal operation of the word *heirs* as a limitation, and to convert it into the description of *purchasers*, as was attempted in the case of *Perrin* v. *Blake*, though the judgment in that case was reversed by seven judges against one in the exchequer chamber. The reasons of that rule, as they were given by Mr. Justice *Blackstone* in his great argument, namely, to prevent the inheritance from being put in abeyance, thus among other evils rendering the tenant for life dispunishable for waste, and also to facilitate the alienation of the whole estate one generation sooner than it otherwise would be, make it peculiarly applicable to the state of *Pennsylvania*. *Hargr. Law Tracts* 500. It was adopted in all its strength in the case of *James's claim* (*b*) in this state, a case very parallel to the present in many particulars.

Giving the estate to the first taker expressly *for his natural life*, is of no importance. So it was held in *James's case*, where many authorities are cited upon the point.

Neither is the rule superseded by making the heirs take a new superadded estate; "to his heirs and their respective "heirs for ever." *Shelley's case* had this very ingredient; "to "the use of the heirs male of the body of *Edward Shelley*, "and of the heirs male of the body of such heirs male." Where there is an estate to the ancestor for life, and then to issue, including all the issue, or to the heirs generally, or to the heirs of the body, the ancestor must take in tail, though the testator directs that the heirs shall take as tenants in common, or superadds words of limitation, unless these words create a new course of inheritance. The limitation here is to *John* and his heirs as tenants in common, and if he dies without issue then over. It includes every possible heir of *John*, and makes him the *terminus* which regulates the descent.

(*a*) 1 *Rep.* 104. (*b*) 1 *Dall.* 47.

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The least that can be required in any case to dispense with the rule, supposing it not to be according to Mr. *Hargrave's* doctrine, indispensable, is to shew by the strongest and most conclusive evidence, that the testator intended to deviate from the general rule, and that his grandchildren should take as purchasers. *Blackstone* allows but four exceptions to the application of the rule. 1. Where no estate of freehold is devised to the ancestor, as in *John de Mandeville's case; Co. Litt.* 26. 2. Where no estate of inheritance is devised to the heir, as in *White* v. *Collins* (*a*). 3. Where words of explanation are added to the word heirs, shewing that the testator did not intend that word in its legal sense, but in a peculiar sense of his own; as in *Burchel* v. *Durdant* (*b*), where the devise was "in trust for *Robert* "*Durdant* for life, and after his decease to the heirs male of "his body *now living*," which of course excluded other heirs. 4. Where the testator has superadded fresh limitations, and grafted other words of inheritance upon the heirs to whom he gives the estate, shewing that he intended to make them the stock of a new descent, and that they were not considered merely as branches from their own progenitor. *Hargr. Law Tracts* 504.

The first two exceptions are out of the present case. The *third* cannot be applied, because the testator has not added any words to shew that *heirs* is to be understood in any but the legal sense. Whatever might be the effect of their taking as tenants in common in *England*, here all the children take by descent as tenants in common, which of course, prevents it from making a difference. All the other heirs were intended to take in succession. The words in the will include all possible heirs; and where that is the case after a limitation of a freehold to the ancestor, the heirs cannot take by purchase. 6 *Cruise* 403. 1 *Fearne* 309. The *fourth* exception has been a source of great difficulty and difference of opinion. The superadded words in *Shelley's case*, it is obvious, produced no effect. In *Dodson* v. *Grew* (*c*), which case resembles this, Justice *Clive* says, too great regard has been paid to the superadded words, "heirs male of the

(*a*) *Comyns* 289. (*b*) 2 *Ventr.* 311. (*c*) 2 *Wils.* 322.

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"body of such issue." That was a devise to *G* for life, and after his death to the issue of his body, *and the heirs of the body of such issue*, and it was held an estate tail in *G*. There is no difference between the cases, except the tenancy in common here, which is of no consequence. In *Minshull* v. *Minshull* (*a*), where the devise was to the second "son of "*R. M.* and the heirs males of his body *and their issues*," lord *Hardwicke* rejected the superadded words, and would not permit them to make "heirs male" words of purchase. In *Luddington* v. *Kime* (*b*), where some stress was laid by the court upon the additional limitation, "and to the heirs "of such issue for ever," the estate was to *Evers Armyn* for life, and if he had any *issue* male, then to such *issue* male and his heirs for ever. So that the word was *issue*, and not *heirs*, and therefore more appropriately a word of purchase. In *Goodright* v. *Pullen*, (*c*) this distinction is taken, and the devise construed an estate in tail in the first devisee, though the difference between this case and *Luddington* v. *Kime* was only between *heirs* and *issue;* "to *Nicholas Lisle* for "life, and after his decease, to the heirs males of the body "of the said *Nicholas and his heirs for ever;* but if *Nicholas* "died without such heir male, then over." The superadded limitation here, therefore, was of no consequence; and it may be asserted as a general principle that it is of no consequence in any case, except where it alters the course of inheritance, which it certainly does not do in the present instance; as if it were to *A* for life, and after his decease to the heirs of his body, and their heirs *female*, as in *Doe* v. *Laming* (*d*). The case of *King* v. *Burchall* (*e*) strongly resembles the present in this and many other points.

There being then none of the reasons in this case which sir *William Blackstone* requires to supersede the rule, the case comes back to the rule, which is superior to intention, if there exists, what no doubt there does, sufficient to bring the rule into application.

But in addition to this, the testator's general intention

(*a*) 1 *Atk.* 411. (*c*) 2 *Ld. Ray.* 1437. (*e*) *Ambl.* 379.
(*b*) 1 *Ld. Ray.* 205. (*d*) 2 *Burr.* 1100.

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was that the children of *John* should take by descent; and this removes every objection that can be raised against an estate tail in *John*. The devise is to *John* for life, and if he dies leaving issue, to his heirs for ever; and if he leaves no lawful issue, then to *John's* brother, who was of course his heir if there were no children. It is therefore, a devise to *John* for life, and if he left issue then to that issue, and if he did not leave issue, then to *James*, which was an estate tail in *John* by the authority of *Tyte* v. *Willis* (*a*). If *John Findlay* takes for life only, his children must take in tail; but they cannot take in tail without taking through their father. If the children took an estate in fee simple, then their father took an estate in tail. They take *quâ* heirs, and must take by descent. If they take as purchasers, then if a son of *John* died during his father's life, leaving issue, that issue could not take, because he would not answer the description in the will; but considering them to take by descent, every possible heir might take. It is defeating the general intent to insist upon an estate for life.

Whether, however, such a general intent existed or not, the rule of law is, in many instances, too strong for intention; *Robinson* v. *Robinson* (*b*); 2 *Fonbl.* 63.; and the greatest names in the history of *English* law, are to be found on the side of the rule in *Shelley's case*, to the whole of this extent. 6 *Cruise* 388. 396., *Hargr. Law Tracts* 561., *Powell on Dev.* 359. 360., *Jones* v. *Morgan* (*c*).

Argument for the plaintiff. Whatever contest the rule in *Shelley's case* may have excited, no one has ever yet gone the length of asserting, that the bare use of the word *heirs*, after a devise to the father for life, is sufficient to bring that rule into operation. It is enough to contend that the intention of the testator shall be beaten down by that rule, where he uses the word heirs in its *legal* sense; but Mr. *Hargrave*, the most learned and the most resolute champion of the rule, expressly agrees, that it has no application to a case in which *heirs* is used in a sense not legal or technical, but peculiar to the testator. Now, there can be no doubt, that the term *heirs*

(*a*) 1 *Cas. Temp. Talb.* 1. (*b*) 1 *Burr.* 38. (*c*) 1 *Bro. Ch. Ca.* 206.

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in this will is a mere *descriptio personarum*, a designation of the children or lawful issue of *John Findlay*, and not a limitation to heirs general; and what distinction then is there between this case and that of *Luddington* v. *Kime?* The devise there was to *Evers Armyn* for life, without impeachment of waste, and in case that he should have issue male, then to such issue male and his heirs for ever, and if he should die without issue male, then to sir *T. B.* in fee. The same is also the case of *Doe* d. *Barnard* v. *Reason* cited in *Doe* v. *Holmes*, (*a*) which was a devise to *E. C.* the testator's niece for her natural life, without impeachment of waste, and immediately after her decease, to such issue of the body of the niece as should then be living, and the heirs of such issue; and if she died without issue, then over to the testator's cousins. In both these cases the first devisee took but for life.

Nothing is necessary, then, but to shew, that the word *heirs* may be so used by a testator as to be a word of purchase, and that it was so used by the maker of the present will.

This whole doctrine was reviewed in the case of *Bagshaw* v. *Spencer*, (*b*) by lord chancellor *Hardwicke*, who said that he conceived the rule in *Shelley's case* to be misapplied; for the principle of that case was to be applied not to the *construction of words*, but to the nature of the estates themselves; and that if the testator's intention appeared plain, as he was supposed to be *inops consilii*, the law would help an improper and unapt expression, by making the words *heirs of the body* words of purchase, and had done it in many cases. The same principle was asserted by the court of King's Bench in *Doe* v. *Laming*, (*c*) where the authority of *Bagshaw* v. *Spencer* was clearly admitted. The whole will must be taken together, and one part explained by another; and if by heirs of the body, children, or first and other sons are seen to be intended, the will is expounded as if heirs of the body were erased, and children inserted. *Lowe* v. *Davies* (*d*), 6 *Cruise* 348., *Goodtitle* v. *Herring* (*e*). There has never been an opinion in modern times that *heirs*

(*a*) 3 *Wils.* 242.
(*b*) 2 *Atk.* 580.
(*c*) 2 *Burr.* 1100.
(*d*) 2 *Ld. Ray.* 1561.
(*e*) 1 *East* 264.

of the body could not be explained by other parts of the same will, and shewn to be descriptive of particular persons, and not of the whole line of descendents. *Perrin* v. *Blake* in no manner affects this rule of construction; for there was no ground in that case to attribute to the testator an intention to use the words in any other than their legal sense. The arguments in that case, as well as in the discussions to which it gave rise, all concede the right to interpret the words according to the testator's meaning; their difficulty was of a different kind, the propriety of applying the rule in *Shelley's case* to wills at all, or if so applied, the propriety of permitting a testator, when he used *heirs* or *heirs of the body* in a legal sense, to intend that they shall be words of purchase. That their legal meaning need not be adopted, is abundantly clear. *Ginger* v. *White* (*a*), *Lessee of Cross* v. *Woodhull* (*b*), *Dodson* v. *Grew* (*c*).

That the word "heirs" in this case was used as a description of the persons, appears evident, from several circumstances; first, because the estate was devised to the heirs of *John*, only in case he left lawful issue; in the next place, because it is upon the death of *John* without lawful issue, that is without heirs, that it goes over to *James;* and thirdly, because, as *James* was an heir himself, there never could be a failure of heirs while he was alive, unless it was used in the sense of children. So that heirs means issue throughout. But there are further evidences of this intention. If "heirs" was used in a legal sense, and therefore a word of limitation, it was impossible that the children of *John* could take by descent as tenants in common; the oldest son of *John* would take the whole estate *per formam doni* as well in *Pennsylvania* as in *England*. The general intent therefore can never be executed but by giving a fee among the children, which can only be as purchasers; and hence the importance of the superadded words, which do change the course of inheritance by admitting heirs general, instead of special heirs, as would have been the case, but for the superadded words.

There is then in the outset, the plain particular intention

(*a*) *Willes* 348. (*b*) *Willes* 592. (*c*) 2 *Wils.* 322.

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of the testator to give his son *John Findlay* but a life estate; there is the general intent that the children of *John* shall take as tenants in common in fee simple, which cannot be, unless *John* took an estate for life; and there are many indications that the word "heirs" was used by the testator in a peculiar sense of his own, which justifies the court in saying that they will understand it to mean children, and therefore a word of purchase, which will prevent the life estate from coalescing with the remainder, and becoming a fee tail in the father.

YEATES J. The present cause is an appeal from the decision of the Chief Justice, in overruling a motion for a new trial after a verdict found for the plaintiff.

The question rests on the true construction of the will of *John Findlay* senior, dated 9th *August* 1783, which was duly proved on the 24th *October* following. The words are as follow: "I give and bequeath to my son *John Findlay*, all "that plantation and tract of land whereon I now dwell, "situated &c., with the appurtenances, to hold to him the "said *John Findlay, during his natural life;* and after my said "son's decease, *if he shall die leaving lawful issue*, I give "and devise the same plantation and tract of land *to his* "*heirs* as *tenants in common, and their respective heirs and* "*assigns for ever*. But in case my said son *John* shall *die* "*without leaving lawful issue*, I give and devise the same "plantation and tract of land to my son *James Findlay*, *his* "*heirs and assigns for ever*." *John Findlay* the son died in 1801; and the lessors of the plaintiff are his minor children, who sue by their guardian.

One judging of the language of this will unfettered by artificial legal rules, would have little difficulty in pronouncing the intention of the testator to have been, that *John* the son should enjoy the plantation during his life; and that his children, if he had any, at his death, should hold the same as tenants in common absolutely in fee simple; but if he had none, that then *James* the other son should hold the premises in fee simple.

The plainest reasons might be given for such an opinion. The father gave the lands to *John* for life in express terms. He could not mean to intail them; because the unavoidable

consequence thereof would be, that unless the intail was docked, the eldest son of *John* the devisee, would enjoy the whole in exclusion of the other children, in tail; and the lands would in like manner devolve on his eldest son, and so on from generation to generation, while issue continued; whereas here the testator had said or meant that *all* the children of his son *John* should inherit as tenants in common and their heirs and assigns respectively for ever. It would follow therefore, that if the devise to *John* was construed to vest an estate tail in him, violence would be done to plain words, and the meaning of the testator be totally disappointed.

But it has been strongly urged by the counsel for the defendant, that the legal operation of the words used by the testator, is too strong for his intention; which is supervened by rigid and imperious rules established for centuries, and which are esteemed the landmarks of property binding on the consciences of judges.

These objections shall be considered: if they are legitimately valid, it is our duty to bow to them. In the mean while, it becomes necessary to remark, that the intention of the testator has always been deemed the first, great, leading, fundamental rule in the construction of wills. It would be an absurd affectation of adroitness in case-hunting, to multiply authorities on this subject. When it is said, that wills must be consistent with the rules of law, the observation is not to be applied to the construction of words, but to the nature of the estates themselves. 2 *Atk.* 580. We are often told in our books, there is no magic in any particular form of words. As applied to wills, the remark is peculiarly just. This clearly appears in many familiar instances. To convey an estate in fee simple by deed, the word *heirs* is an indispensable term of art: so to create an estate tail by deed, words of procreation must be used, as *heirs of the body* &c. But the law benevolently supposes a testator to be *inops consilii*, and will carry his intention into effect, if his meaning is plain and perspicuous, though clothed in unapt words. Thus a devise of lands to one *for ever*, or *to do with at his will and pleasure* &c., will pass the fee simple. And the terms *proli*, *semini*, *issue*, *or children* in a will, will pass a fee tail, where

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such appears to be the true meaning of the devisor. *Reynolds* justice asserted a clear truism, when he said, that a man shall be allowed to speak his mind in his will. *Fitzgib.* 113. The doctrine of the intentions of testators being carried into effect is laid down with great precision by Mr. *Butler* in his note on *Co. Litt.* 379 *a*, in these words: "It is certain, that "no rule of law has a more ancient origin, or is more gene- "rally established, than that if a testator expresses his inten- "tion defectively, either by not using technical and artificial "terms, or by using them improperly, yet if his intention "can be collected from his will, the law, however defective "his language may be, will construe his words according to "his intention; and if the object of it is warranted by the "established rules of law and equity, will admit its full "operation and effect. It is equally certain on the other hand, "that if the testator's intention appears to be to effect *that* "which the rules of law and equity do not admit, neither the "courts of law, nor the courts of equity can allow its opera- "tion. The first thing therefore, to be ascertained, is, what "the object of the testator is; the next, whether it is such as "the rules of law and equity admit."

I fully agree that the best rule in the construction of wills, is to find out first the general intent, and then as far as language and grammar will admit, to interpret particular expressions accordingly; and that in order to give effect to the general intent, the court will overlook a particular intent inconsistent therewith. Here, though an express estate for life was given to *John* the son, yet if to effectuate the great general intent, it becomes necessary to construe the devise to him as an estate of inheritance, the law will so construe it; as in the celebrated case of *Robinson* v. *Robinson*, 1 *Burr.* 38. There the special intent was defeated; the first limitation was to *Lancelot Hickes for life and no longer*. Nothing therefore could be more clear, than that the testator only intended to give him an estate for life; yet seeing that *that* particular intent was inconsistent with the testator's general intent, which was that the whole line of male heirs of *L. Hickes* should take, the court held themselves bound by law to effectuate that general intent.

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The first ground on which it has been contended, that *John* the devisee took an estate tail, was, that when the father devised the lands after the decease of *John*, *to his heirs*, *if he died leaving lawful issue*, he thereby meant *his issue;* and that this is rendered still more clear, from the remainder over being limited to *James* in fee, *in defect of such issue;* because *John* the first taker could not be said to die without *heirs*, living his brother *James*. It has been resolved in many cases, that under a devise "*to* A *and his* "*heirs*, remainder over for want of such heirs," to a person who might take the estate as *heir*, the word *heirs* is thereby restrained to *heirs of the body*, and the devisee takes an estate tail. *Cowp.* 235., 2 *Fonbla.* 58. *Aliter*, when the remainder over is limited to a stranger. 1 *Roll. Rep.* 398., 3 *Bulst.* 192., 2 *Eq. Ab.* 305., 1 *Vez.* 89., 3 *Atk.* 617., 3 *Lev.* 70., *Cases temp. Talb.* 1.—Where one had issue *A* and *B*, and devised land "to *A*, and if he died without *heirs*, that *B* his "brother should have them," *A* took an estate tail. *Freem.* 74., 8 *Vin.* 219. *pl.* 9., *Willes* 165. 370. So under a devise "to *R. C.* for the term only of his natural life, and after his "decease to the issue of the said *R. C.* as tenants in com- "mon; but in case the said *R. C.* shall die without leaving "issue, then a devise of the same to *E. H.* in fee;" this is an estate tail in *R. C.* 1 *East* 229. The reason is plain. The clear general intent of the testator was, that all the issue of *R. C.* should inherit the *entire* estate, before it went over, and that *E. H.* should take nothing until the issue of *R. C.* wholly failed. If *R. C.* was intitled to an estate for life only, his children could take no larger estate, there being no words of limitation of the inheritance to them; and on the decease of any of the children, their shares would devolve on *E. H.*, while other children of *R. C.* were living; or even while issue of the deceased child was in full life, which would clearly disappoint the chief intention of the testator. But our principal case is differently circumstanced, by additional superadded words of inheritance to the heirs of *John*, *to them as tenants in common, and their respective heirs and assigns for ever*. There is nothing incompatible or inconsistent with the general intent, in declaring, that *John* should hold the plantation during his life, and his children if he had any, hold

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the same after his death in fee simple, as tenants in common; but if he had none, that it should go over to *James* in fee. This materially contradistinguishes the will under consideration, from the cases cited by the defendant's counsel; in all of which, in order to give effect to the chief intention of the testator, it became indispensably necessary to hold, that the first takers were vested with an estate in fee tail. It seems to me fully to answer them.

But the great reliance of the defendant's counsel for their construction, is, on what is called the rule in *Shelley's case*, 1 *Co.* 104 *a.*, *Co. Litt.* 376., that "when the ancestor by any gift "or conveyance takes an estate of *freehold*, and in the same "gift or conveyance, an estate is limited either *mediately* "or *immediately* to *his heirs* in fee or in tail, always in such "cases, *heirs* are words of *limitation* of the estate, and not "words of *purchase*."

The existence of this rule is admitted; and so far as respects limitations of legal estates in conveyance by deed, its prescriptive claim to control seems established. Nor is there any difference of opinion as to its giving way to more prevalent principles of construction in marriage articles. But its authoritative controlling force in the construction of wills has led to a controversy, in which we find the most profound abilities anxiously and strenuously opposed. 2 *Fonbl.* 72.

Different *English* judges have expressed their opinion on the extent of the rule. We are likewise furnished with the learned observations of Mr. *Hargrave*, Mr. *Butler* and Mr. *Fearne* on its true application. Mr. *Hargrave* insists, that the rule is a conclusion of law upon certain premises so absolute, as not to leave any thing to *intention*, if the premises really belong to the case. *Hargr. Law Tracts*, 561. In such instances, he would apply the rule, even though the party should express in his will, that the rule should not be applied, and that the remainder to the heirs of the tenant for life should operate *by purchase;* though he admits that this strong sort of case has not yet occurred in a court of justice. *Ib.* 562. He holds the rule to be a policy of law, and that it is of a quality rigid, stubborn, imperious, irresistible, and so indispensable as to be above all exception whatever; *Ib.*; and that firm and immovable in its claim of sole empire, and looking

down on private intention as its lawful subject, the rule will neither give nor accept of any terms of capitulation. *Ib.* 574.

Mr. *Fearne*, whose *Treatise on Contingent Remainders* was meant evidently to impugn the opinion of lord *Mansfield* in *Perrin* v. *Blake*, admits that the zeal of Mr. *Hargrave* had pursued the rule to an inflexible degree of *imperative* control, which would hardly be reconcilable with the long established principles applicable to the construction of wills, were it not for his resting the admission of the rule on a *previous question* referrible to the testator's intention. 1 *Fearne*, 294. *4th ed.* Lord *Mansfield* in *Perrin* v. *Blake*, 6 *Cruise* 389, observes that he always thought, as the law had allowed a free communication of intention to a testator, it would be a strange law to say, "now you have commu- "nicated that intention, so as every body understands what "you mean, yet because you have used a certain expression "of art, we will cross your intention, and give your will a "different construction; though what you meant to have "done is perfectly legal, and the only reason for contrave- "ning you, is because you have not expressed yourself like "a lawyer." His examination of the rule always convinced him, that the legal intention, when clearly explained, was to control the legal sense of a term of art, unwarily used by the testator. He held the rule to be clear law, but that it was not a general proposition subject to no control, as where a testator's intention was manifestly on the other side, and when the objections might be answered. *Ib.* 390. *Willes* and *Aston*, justices, concurred with him in his idea of the rule, the reason of which was long since antiquated; and therefore it should not be extended one jot. *Ib.* 382, 383. But *Yates*, justice, dissented, and held the rule laid down in *Shelley's case*, to be a rule of construction in the devise of a legal estate, binding on judges. *Ib.* 386.

Sir *William Blackstone* admits, that the rule when applied to devises may give way to the plain and manifest intent of the devisor, provided that intent be consistent with the great and immutable principles of *English* legal policy; and provided it be so fully expressed in the testator's will, or else may be collected from thence by such cogent and demonstrative arguments, as to leave no doubt in any reasonable mind,

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whether it was his intent or not. *Harg. Law Tracts* 502, 503. But he was far from maintaining, that by a devise to a man's *heirs*, or *the heirs of his body*, they shall never take as *purchasers*. *Ib.* 504. They should be so construed, whenever the intent of the testator was clear and manifest. *Ib.* 507.

Lord *Thurlow* understood the rule to be, that where the *heir* took in the *character of heir*, he must take in the *quality of heir*. The rule had never been shaken at all, and he had never heard it contended that the testator could vary the sense of the law. *Jones* v. *Morgan*, 1 *Bro. Ch. Rep.* 216. By all the cases, where the estate is so given, that after the limitation to the first taker, it is to go to every person who can claim as heir to the first taker, the word *heirs* must be a word of *limitation*. All *heirs* taking *as heirs*, must take by descent. *Ib.* 219. According to Mr. *Cox* in his *note* 2. to 1 *Pr. Wms.* 132., this seems to be the settled law of *England*.

The rule is agreed on all hands, to be still an unbroken pillar of the feudal system, which cannot be demolished and thrown with the rubbish of the dark ages. 1 *Hen.* & *Mum.* 261. The maxim was originally introduced in favour of the lord, to prevent his being deprived of the fruits of the tenure; and likewise for the sake of specialty creditors. The reason of the maxim hath long ceased; because tenures are now abolished, and contingent remainders may be preserved from being defeated before they come *in esse:* yet having become a rule of property, it is adhered to in all cases *literally within it*, although the reason has ceased. But where there are circumstances which take the case *out of the letter* of this rule, it is departed from in favour of *intention*, because the reason of the rule has ceased. 2 *Burr.* 1107.

It has however been strenuously insisted, that where an estate of freehold is limited to the ancestor, no subsequent limitation *to his heirs*, or *the heirs of his body*, can make them *purchasers; Dubber* v. *Trollope*, *Ambler.* 462.; and that in such case, the inheritance will not go to all the heirs in the course of inheritable succession, unless by an actual descent; consequently if after the first taker, it is to go to every person who can claim as heir to him, the intended succession can only be effectuated by taking the word *heirs* &c. as words

of limitation. If after him, *all heirs* &c. are to take *as such*, that is, as answering that description, they can only take by descent. 1 *Fearne* 309.

Certainly, there are many cases which have been adjudged even at law, wherein the words *heirs*, and *heirs of the body*, as well as *children*, *issue* &c. have been determined to be words of *purchase*, some of which I shall proceed to enumerate.

In *Archer's case*, 1 *Co.* 66., the limitation was to *A* for life, and after to the next heir male of *A*, and to the heirs male of the body of such next heir male. The devise to the heir was held to be a remainder by purchase.

In *Wild's case*, 6 *Co.* 17., if a devise be to *A* and his children, and there be no children then in being, it gives an estate tail; because the devise is in words *de presenti*, and there being no children in being, they must take by way of limitation. But if a devise be to *A*, and *after his decease* to his children, *A* has only an estate for life; because then the words plainly shew that the children were intended to take by way of remainder.

In *Clarke* v. *Day*, *Moor* 593., *Cro. El.* 313., *Ow.* 148., 2 *Rol. Ab.* 417. *pl.* 7., *A* devised lands to her daughter for life, and if she should marry after the death of the testatrix, and have any heirs lawfully begotten, then she willed that her daughter's *heir* should have the land after her daughter's death, and the heirs of such heir; and adjudged to be an estate for life in the daughter.

James v. *Richardson*, *Pollex.* 457., and *Burchett* v. *Durdant*, 2 *Vent.* 311., *Carth.* 154., arose on the same will. In both causes a devise to the heir male of *R. S. now living* was held good.

Long v. *Beaumont*, 2 *Vern.* 735., is cited 1 *Pr. Wms.* 229. There a devise to the heir male of *E. L.* lawfully begotten, and for want of such heir, to his own right heirs was held a good devise; although not to the heirs of the body, the description being supplied and made good by other words tantamount.

Wedgward's case, 1 *Rol. Ab.* 837. *pl.* 13., cited by lord *Hale* in the case of *King* v. *Melling*, 1 *Vent.* 231., was a limitation to one for life, *et non aliter;* and after his death to the sons of his body. Held that an estate for life only passed.

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Lisle v. *Gray*, 2 *Lev.* 223., *Poll.* 582., *T. Ray*, 278. 302. 315., *T. Jo.* 114., 2 *Show.* 6., arose on the effect of *a deed* as to the legal estate, wherein the words *heirs male of the body* were held to be words of *purchase*, by necessary construction arising from the context.

Luddington v. *Kime*, 1 *Salk.* 224., 1 *Ld. Ray.* 203., 3 *Lev.* 431., has strong features of resemblance to the case now in question. *A* devised land to *B for life*, without impeachment of waste, and in case he should have any *issue male*, then to such *issue male, and his heirs for ever*. Resolved, that *B* took an estate for life, and his issue male a contingent remainder in fee.

Backhouse v. *Wells*, 10 *Mod.* 181., *Fortesc.* 139., 1 *Equ. Ab.* 184. *pl.* 27., was a devise to *J. B.* for his life *only*, and from and after his death to the issue of his body lawfully to be begotten, with remainder to the heirs male of the body of that issue; and adjudged, that *J. B.* was tenant for life, with remainder to the issue in tail.

The cases of *Leonard* v. *the Earl of Sussex*, 2 *Vern.* 526., *The Earl of Stamford* v. *Sir John Hobart*, 1 *Bro. Parl. Cases* 288., *Withers* v. *Allgood*, cited 2 *Ves.* 237., *Ashton* v. *Ashton*, cited 1 *Ves.* 149., and *Bagshaw* v. *Spencer*, 2 *Atk.* 570., 1 *Ves.* 142., might also be adduced to shew the decrees of different chancellors in cases like the present.

Fearne in his *Essay on Contingent Remainders*, 236, 237, has remarked, that these are all cases of *trusts*, and no ruling authorities for the construction in cases of legal estates. I shall content myself with citing the words of lord *Mansfield* in reply. "A court of equity is as much bound by positive "rules, and general maxims concerning property, though the "reason of them may now have ceased, as a court of law is. "Whatever is sufficient upon a devise, to make an exception "out of the rule, holds in the case of a *legal* estate, as well "as in the case of a *trust*. If the intention of the testator be "contrary to the rules of law, it can no more take place in a "court of equity than in a court of law. If the intention be "illegal, it is equally void in both." 2 *Burr.* 1108. In the case of *Bagshaw* v. *Spencer*, all the cases upon this subject were ransacked and thoroughly considered: and lord *Hardwicke* held, that *heirs of the body*, after an estate for life

to the father, should be construed words of *purchase*. He asserted, that a plain intent of the testator would change those words from terms of limitation to those of purchase; and that lord *Talbot* had said, the rule of law was not *so strict*, as to control the testator's intent, where it was plain. 2 *Atk.* 582.

In *Law* v. *Davies*, *Fitzg.* 113., 2 *Ld. Ray.* 1561., 1 *Barnard.* 238., 2 *Stra.* 849., 2 *Equ. Ab.* 316. *pl.* 28., there was a devise to *B*, and his heirs lawfully to be begotten; that is to say, to his first, second, third, and every other son and sons successively lawfully to be begotten of the body of the said *B*, and the heirs of the body of such first, second, third, and every other son and sons successively &c. remainder over: And it was determined that *B* took but an estate for life.

In *Ginger ex dem. White* v. *White*, *Willes* 348, there was a devise to *A* for life, then to the children of *A* successively and their heirs, and if *A* died without issue, then to *B*, son of the elder brother of *A* in fee: it was held, that *A* took only an estate for life. It resembles in many particulars the will before us. Lord chief justice *Willes* strongly insists on the necessity of adhering to the intent and meaning of the testator; and declares, that he would always endeavour, if he possibly could, that the intent of the testator might take effect, and would never take pains to find out little niceties in the law, to defeat the intent of the testator. He laid down the rule of law, that a precedent estate devised by express words, cannot be lessened, increased, or altered by implication, though it might by express words. *Ib.* 355.

Goodtitle ex dem. Cross v. *Woodhull* et al. *Willes* 592., is to the same general effect, and was decided in the same manner.

Doe on the demise of Long v. *Laming*, 2 *Burr.* 1100., appears to me a strong modern authority for the plaintiff. It was determined in 1760. It was a devise of *gavelkind* lands to *A* and *the heirs of her body*, lawfully begotten or to be begotten, *as well females as males*, and to *their heirs and assigns for ever*, to be divided equally share and share alike, *as tenants in common*, and not as joint-tenants. And adjudged *una voce*, that *A* did not take an estate tail. *S. C.* 1 *Blac. Rep.* 265. The reasons of the decision are thus detailed in

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1 *Fearne* 235, 6. The words *heirs of the body* did not stand independent and unqualified, but were corrected and explained very expressly, by the words which followed and were coupled with them; the words *as well females as males* annexed to the words *heirs of the body*, were incompatible with and expressly broke the descent; because *gavelkind* lands could not descend in that manner; and the devise expressly created a tenancy *in common*, which was impossible *by descent*, as that must have been in *coparcenary*. And besides, there were words of limitation *in fee* grafted on the words *heirs of the body*, which could not have been satisfied by an estate tail in the ancestor.

Gavelkind lands in *Kent* are equally divided among the sons on the father dying intestate. *Litt. S.* 210. This custom is in unison with our law; except that females here share equally with males the real estate of their father when he dies intestate. Previous to our act of 19th *April* 1794 the eldest son took a double share. Now all the above reasons apply to the case under consideration. The word *heirs* cannot point to the eldest son, but includes all the children of the first taker, as well female as male, which could not be the case if he took an estate tail. They were to hold as tenants in common, which could not be if their ancestor took an estate tail and the sons claimed successively *per formam doni*, and here are superadded words in fee to the *heirs respectively*, which are clearly irreconcilable with their father's taking an estate in tail.

The observations of lord *Mansfield* as to gavelkind lands in the case just cited, apply with peculiar force to the equal spirit of our laws regulating the descent of real estate. The term *heirs* (in the plural) in the case of gavelkind lands, answers to the term *heir* (in the singular) in the common case of lands which are not gavelkind. For the word *heir* (in the singular) would not serve for gavelkind lands, it must be *heirs* (in the plural.) Therefore all the arguments and reasonings that are applicable to the word *heir* (in the singular) in the common case of lands not being gavelkind, hold with equal strength and propriety, when applied to the plural termination *heirs*, when the lands are gavelkind. 2 *Burr.* 1110. Lord *Mansfield* concludes his opinion by saying, that there

is no rule of law that prevents *heirs* taking as *purchasers*, where the intention of the testator requires that they should do so. *Denison* and *Wilmot* justices, (*Foster* being absent) concurred with him in opinion, that the intention of the testator as disclosed in his will must govern its construction, provided the nature of the estate be legal, and the same sentiment is ascribed to lord chief justice *Wilmot* in *Keily* v. *Taylor*, reported in 6 *Bro. Parl. Ca.* 309, as cited by *Buller* justice in *Doe* v. *Lyde*, 1 *Term Rep.* 597.

This case having been argued before the Chief Justice, when the citing of *British* authorities subsequent to the *American* revolution was not prohibited, and considerable stress having been placed during the argument in bank, on the opinion of lord *Thurlow* in *Jones* v. *Morgan*, as summed up by *Cox* in his note on 1 *Pr. Wms.* 132, before cited, I do not deem it incorrect to state, that the opinion of lord *Kenyon* in *Goodtitle* v. *Herring*, 1 *East.* 272., accords with that of lord *Mansfield* as to the application of the rule in *Shelley's case*, and that lord chief justice *Alvanley* adopts an idea of the same kind, in *Poole* v. *Poole* et al., 3 *Bos.* & *Pul.* 627.

In *Hockley* v. *Mawley*, 1 *Ves. jr.* 143., lord *Thurlow* says, that where there is a devise to persons in remainder, after a tenancy for life, to take *distributively*, and according to proportions, they must take as purchasers, for there is no other way for them to take. See also *Goodright Lessee of Docking* v. *Dunham*, *Doug.* 251, (264.), *Doe Lessee of Comberbach* v. *Perryn*, 3 *Term Rep.* 490., *Seaward* v. *Willock*, 5 *East* 205., *Jacobs* et uxor v. *Amyatt* et al., 4 *Bro. Cha. Rep.* 542.

In the case of the *Lessee of Smith* v. *Folwell* determined in this court, *Tilghman* Chief Justice observed, that there is no doubt, that the word *heirs* may be construed as a word of *purchase*, when the testator appears to have used it with a view of *designating* a particular person. 1 *Binn.* 559. All the members of the court delivered their opinions much at large on what they severally conceived to be the true meaning of the will. *Ib.* 560.

The construction of wills should be favourable to the intent of the parties, and agreeable to *common* understanding. *Ander.* 60., 1 *Bulst.* 175., *Hob.* 304., 2 *Bl. Com.* 379. And where the intention of the will is plain, it ought to control the legal operation of the words. 2 *Pr. Wms.* 673., 4 *Burr.* 2246.

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I admit, that the word *issue* is either a word of *purchase* or of limitation, as will best effectuate the testator's intention. I also hold, that *heirs* and *heirs of the body* have likewise been restrained as words of *purchase*, when the same were evidently used in a will in that sense; though I concede, they always give way *with greater difficulty* than the word *issue*. 4 *T. R.* 294, 299, 300. I use the expressions of Mr. *Hargrave* in his observations on the rule, p. 562, when I say that it clearly appears to me, that "the testator in this will "has applied the word heirs, in a *peculiar sense of his own*." Technical rules are not to be relied upon in explaining the intention of testators; and yet cases of intention are much embarrassed by authorities. An anxiety to effectuate what has been considered the leading intention of a testator, has introduced all the difficulty in this kind of cases. 1 *Bos.* & *Pull.* 221. See 1 *T. R.* 597., *Doug.* 327, (341).

According to *Fearne's* delineation of the rule in *Shelley's case*, it comprehends two discriminating lines, whose concurrence seems to decide its application; the one is, that the person to claim the inheritance *after the ancestor*, is to claim *as heir*, that is *eo nomine*, and under *that description*, whoever such person may be; and the other, that the effect of the limitation is not confined to the person so *first* claiming, or *his* representatives *as such*, of any description, but directed equally through *all other persons* successively answering the same relative description of *heirship* general or special, to the *ancestor* referred to, and intitling them *eo nomine*, or in that character only. 1 *Fearne* 310. He admits, that the latter branch of the distinction excludes all those cases, where the words of limitation superadded to the words *heirs* &c. denote a *different species of heirs* from that described by the first words; as in the case put by *Anderson* in *Shelley's case*.

Of the true meaning of this testator in the devise under consideration, I have not a particle of doubt. What greatly weighs with me in the technical legal exposition of the will, is, that so far from any words therein shewing a general intent to give an estate tail to *John* the son, in contradiction to the estate for life given to him in precise words, we plainly see that by con-

ferring on him such estate tail, we wholly defeat the provisions of the testator; whereas by giving him an estate for life, and a contingent fee to his children, we effectuate every intent both general and particular. I therefore feel myself authorized to construe the word *heirs* in the first part of the devise, as *children*, or *sons* and *daughters*, and as a mere *designatio personarum;* and I conceive that they were to take in fee simple, in the same manner as the remainder over was limited to their uncle *James;* and that such devise was perfectly consistent with the established rules of law.

Upon the whole, I am of opinion, that the judgment of the Circuit Court should be affirmed.

BRACKENRIDGE J. It occurs to me to make a grammatical analysis of the words of this devise. "If he shall die "leaving lawful issue, I give and devise to his heirs as tenants "in common, and their respective heirs and assigns for "ever." For the pronoun, *he*, substitute the noun for which it is used, and the sentence will be, "If my son *John* shall "die leaving lawful issue, I give and devise to his heirs." The word *his* must refer to *John*, because the issue might be *female*, and the word *his* would not correspond; and issue might be *plural*, and *his* would not correspond. It must therefore be, "If my son *John* shall die leaving lawful issue, "I give to *John's* heirs, and their, &c." The word *their* must refer to *heirs* before mentioned; and therefore the whole sentence must be, "*If my son* John *shall die leaving* "*lawful issue, I give to* John's *heirs, as tenants in common,* "*and heirs' respective heirs and assigns for ever.*"

The first branch of the sentence, with the nouns substituted for the pronouns, will be, "If my son *John* shall die "leaving lawful issue, I give to *John's* heirs, &c." Does the word *heirs* here mean all that can claim descent from the same common ancestor, or heirs general? If so, why in the next branch of the sentence, *heirs of heirs?* The fee had been sufficiently given before in the life estate to *John*, with the remainder to *John's* heirs. This proves, that by *heirs* in the first branch of the sentence, is meant *issue;* and the devise in that case will be, "If he shall die leaving issue, I "give to his issue." The word *their*, must in that case be

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supplied by the word *issue;* for it is that instead of which it is used; and the whole devise will then be, *If my son* John *shall die leaving lawful issue, I give to his issue, and issue's respective heirs and assigns for ever.*

The word *heir*, in the first branch of the sentence, meaning issue, it might be natural to understand the word heirs in the last branch to be the same; and so, it would be to his issue, and issue's respective issue and assigns for ever. This gives the inheritance to the remotest issue. But, on the failure of issue, who would take? Not the *remainder man;* for his contingency had gone, on *John's* dying leaving lawful issue. It must be one who can trace his ascent to some common ancestor; and therefore the word *heirs* in the last branch of the sentence, must mean more than issue, and be taken in a technical sense, and mean general heirs, to avoid an escheat on the failure of issue. Having thus ascertained the meaning of the *terms*, I come to consider the *effect* of them in this devise.

The word issue is a word of *limitation*, or of *purchase*, accordingly as it is used as a *nomen collectivum* or *nomen singulare*. The word *respective*, fixes the meaning of the word here to be *nomen singulare;* for it is a term of individuality, and must have *several* to refer to. *Tenants in common* also imply several. So that it is used here as a word of purchase. And, even if we take the word *heir* instead of the word issue, it must receive for the same reason the same construction. Distinct issues taking at the same time, is inconsistent with a taking in tail, where but one can take at a time; and the taking by distinct issues must be *in succession*. It is clear, therefore, that the testator did *not mean* an estate tail; nor, will the terms *necessarily* carry it.

But the law will warrant the construing it an estate tail, if it be necessary to effect *the intent*, even at the expense of a *particular* intent, and to reach this, will reject and supply words; as, in this case, the word *respective*, and the words *tenants in common*.

This will introduce the inquiry, what was the *general intent? It was the providing for the issue of* John *the son*. Could a grandchild take under the term issue? It must be so; otherwise, no child being left, but a grandchild, the re-

mainder would go over from the issue. But a tenancy in common of a grandchild with a child was not intended; and it will disturb the *proportion* of the issue in the first degree. There may be *several grandchildren of one child.* All these to take *per capita*, will not be within the *intention;* and they must take *per stirpes*, if the intention was observed; in *loco parentum*, and *as heirs.* Whether they can take *as heirs*, not construing the devise an estate in tail, will be *the pinch of this case*, which I will by and by consider; but in the mean time I will ask, will it effectuate the intention better, to construe it *an estate tail?* Each of the offspring has, in that case, an equal chance of coming to the whole estate, by succession; but not an equal chance, *in point of time;* and the taking is liable to be defeated altogether by a *bar of the intail;* and defeating not only a taking by the issue, but, in case of no issue left, defeating the taking by *him in remainder over*, who, in this case, is a younger son of the testator, and for whom he must be supposed to intend strongly this interest, which is more particularly marked by making him an *executor.* So, that it may not be so clear that an estate tail will best effectuate the intention, with regard to the issue; and certainly, with regard to the remainder man, in case of the contingency in his favour, *not at all.*

But will not the law imperatively construe this an estate tail? That is to say, will not the *legal rules of construction*, which are rules of property, make this an estate tail?

Hargrave, in his observations concerning the rule in *Shelley's case*, 1 *Law Tr.* 574., has laid down what he conceives to be the first step in the investigation of the application of this rule. That is, whether by a remainder to the heirs either general or special of the preceding tenant for life, it is the meaning of the instrument, to include the whole of his inheritable blood; or to design only a certain individual person answering to the description of the heir at his death; or, as we would inquire in the case before us, certain individual persons *answering to the description of heirs at his death.* Nothing can be better founded, says *Fearne*, in his comment on these observations, than "that the application of the rule supposes "the *intention discovered.*" 1 *Fearne* 295. And though this discovery, which must be made previous to the application of

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the rule, is spoken of by *Hargrave* as "of all juridical questions the most simple," yet *Fearne*, with whom I agree, considers it as the *hoc opus, hic labor*. He subjoins, however, what he conceives to be reducing the inquiry respecting the admission of the rule to two simple questions, viz. "is the "limitation to the heirs &c., so calculated and directed, that "the person claiming under it must intitle himself merely "under the description of heir of the species denoted by the "words, in their technical sense? And if so, is there any "thing to restrain the same words from equally extending "to, and comprehending all other persons successively answering the same description; or from intitling them alike "under it, and *eo nomine* only? A negative answer to either "branch of this inquiry seems to exclude the application of "the rule."

Putting these questions, in the present case, I ask, of what species are the heirs spoken of in this devise, *general* or *special?* They are *special* heirs; heirs of the body. But is it merely under the description of heir of the body, in the technical sense, that these could claim? If I was to answer and say here, that the heir claiming in this case must be an heir of the body, yet I could not say that there is any thing to restrain the same words from equally extending to and comprehending all other persons successively answering the same description; or from intitling them alike under it, and *eo nomine*. For it is not the *eldest born*, or first issue only that can take under this devise; but the *younger born* may equally take. Nay it is a part of the devise; and under the same denomination of issue with the eldest born. For his *heirs* must be referred to issue, as those heirs which are to take.

I cannot doubt but that by the word heirs the testator meant issue, and by their heirs, he meant their issue, and intended to restrain the devise to these taking from the immediate issue as a new stock, and not by descent from the testator as the *terminus a quo*. The words "*their respective heirs*," must intend other than those that would be equally heirs, which must be the case, to all claiming through the same ancestor.

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By the tenancy in common, *the descent must be intended to be broken.* Our statute of distribution, in the case of intestacy, gives a tenancy in common of a fee simple estate. But an *estate in tail is not the subject of an intestacy.* The law regulates the descent to the heir in tail, which shews, at least, that the testator did not use the word heir as meaning heir in tail in his own intendment.

But there are *rules of construction by which the intention must be ascertained;* and these will control the discretionary construction of a judge upon what appears to him the *apparent* intention: certain established legal maxims deducible from decisions. These are, such as construing words according to their technical signification, unless by relation to some other word, they are shewn to be used in a *popular* sense. As, in the devise in question, where the devise being, "if he shall die leaving lawful issue, I give to his heirs," shews, by relation to the word issue, that by heirs he meant issue. And in the next part of the devise, "to their respec- "tive heirs," shews that he refers to heirs of a new *terminus*, and *the ingrafting an inheritance upon a separate stock.* The tenancy in common also evinces this, which, in the language of *Fearne*, is impossible by descent. 1 *Fearne* 107, 237. So that it is inconsistent with the idea of meaning an estate tail in the son, to devise a *tenancy in common* to the issue, of whom but one can take, unless in succession, and that *the whole.* And this was laid down as a ground of construction by *Mansfield* and *Wilmot* in the case of *Doe* v. *Laming*, 2 *Burr.* 1110. And, in the illustration of those questions which *Fearne* makes a criterion of the application of the rule in *Shelley's case*, from the evidence of the intention, he considers all those cases as excluded from the operation, where the words heirs of the body &c. are by other words of reference or qualification explained or restrained to the *first and other sons*, as well as those wherein, on account of words subjoined, persons to take cannot take as heirs or by virtue of that description, by reason of the distributive direction among several not constituting an heir; or as tenants in common; or in some other mode not reconcilable with the course of descent, as in *Doe* v. *Laming* and others of that sort.

But *the pinch* at which I have already hinted, is the *con-*

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sequence, in a possible event, of not construing this devise an estate tail. For, in construing a will we must put ourselves in the situation of having it laid before us, at the time of the writing, and as looking then, to what might turn out to be the application of our construction, at the time of the decease. As for instance, in this case, the possible dying and leaving lawful issue immediate and remote, with a *plurality* in the representatives of one, who, if they take at all, it must be *in loco parentum;* that is, not *share and share alike* with the immediate issue living, but the share of the parent deceased.

Something was thrown out in the course of the argument, at the bar, by the counsel contending for the estate tail, of a confidence of what the opinion would be of the elder of the profession were it taken, on this devise. The case being held under advisement, and it so happening that I had an easy opportunity, I put the case to one of the *eldest and ablest of the profession* in the state, and totally unconcerned in the matter, but submitted merely as a problem in legal science, in that abstruse part of it, the doctrine of devises and contingent remainders. His note to me I hold in my hand and will read it. It is as follows:

"Is the rule in *Shelley's case* conclusive? No. Where an "estate for life is given, with intention expressed by *declara-* "*tion plain* (*Hobart*) that issue,—children—first and every "other son, even heirs of the body lawfully begotten, (2 *Bur.* "1101) shall take *as purchasers*, the express estate for life "shall not by construction, or implication, be enlarged to "an estate in tail.

"The intention in the present case is most evident, that "the *issue of* John, *alive at his death*, should take a fee. The "words "and to their heirs and assigns for ever" demon- "strate such intention. In the arguments respecting similar "cases, it has been contended that issue is *nomen collectivum*, "and comprehending all future issue to the latest genera- "tions; hence it has been concluded that issue cannot be a "word of purchase, but of limitation annexed to the taker "for life, uniting to his estate all possible issue at ever so "late a period, and thereby necessarily creating an estate in "tail in the devisee for life. The stress of the argument is,

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" to shew that issue is not to be considered as a word of " purchase; but it cannot apply to the present case, where the " *intention* is plain that it shall be a word of purchase. It is " of the essence of an estate in tail, that issue *ad infinitum*, " 1000 years hence, are looked upon to be included in it. " Without such *view* there can be no estate in tail. Does " the death of the child in *John's* lifetime, (a possible event) " create a difficulty, such child having left a child who sur- " vived *John?* It seems that it does not. The estate in- " tended to be created by the testator was conditional. If " *John* left issue, (at the time of his death) such issue was " to take a fee *in common*. Neither by the words, or inten- " tion, is the condition to be fulfilled by the existence of *im-* " *mediate* issue,—to wit, a child,—issue only is called for, and " to be in existence, at a lawful time (the death of the de- " visee for life) for the fulfilment of the condition. *Issue;* a " great great grandchild is *issue*, and certainly intended by " the testator. Was it his meaning that if *John* left a son— " he *John* should only have an estate for life; but, if he left " a grandson, *John* should have an estate in tail?

" As to *the tenancy in common*, the peculiarity of the word- " ing seems to relieve us from difficulty in the case put. " I " give to his heirs" shews how issue were to take, viz. *as* " *they were heirs*. The testator may reasonably be pre- " sumed to have contemplated that *John* would die, leaving " a son *B.* and grandchildren *E. F.* sons of *C.* a deceased " son—then how are *B.*, *E.* and *F. issue* alive at the death of " *John*, to take? Surely *as* they were heirs. *B.* one half—*E.* " and *F.* the other half. He dont mean heirs general, but " such as were issue of *John* alive at *John's* death. The " word " heirs" in a will is always understood such heirs as " testator meant. 1 *Vesey* 25. If an estate tail is to be raised " here, it must be by implication. What is the rule? When " necessary " to effectuate the *manifest general* intention of " the testator;" the words of Mr. *Harvey* arguing in favour " of an estate in tail. 3 *Burr.* 1634.

" It is fatal to the idea of an estate in tail, that *indefinite* " issues of *John* were not contemplated by the testator—in- " definite in point of time—on the contrary, issues at *John's* " death then alive."

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So far the note of this gentleman; and if correct in what I call the *pinch of the case*, as to the issue remote taking by purchase, and the proportion of the stock in the first degree, and *as heirs* would take in case of a descent, there is nothing in the way of effectuating the general intent of providing for the issue, in any event that may happen, *construing this an estate tail.* The *particular* intent may then stand of giving the first taker an estate for life.

In contemplation of law, the barring the intail by a fine and recovery is not a defeating the *general* intent in favour of the issue; because a fee of equal value is supposed to come for their use; but this being but a fiction, the general intent is in fact destroyed, and the issue are left without provision. Shall we then raise such *an estate by construction*, as will destroy *the general intent*, by putting it *in the power of him to destroy it*, out of whose power it was intended to be kept, by the giving him but an estate for life? I do not think that any possible event could justify it; and that, if even remote issue could not take under the denomination of heirs, this event not contemplated by the testator ought not to be provided for *at the expense of any intent contemplated and expressed.* I think myself therefore warranted in construing the estate to *John an estate for life*, and *not an estate tail.*

Judgment affirmed.

3b 169
2sr 36
4sr251
4sr255
4sr258
5sr122
8sr 88
11sr298
3r 278
10 508
17 52

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Lessee of DUNLOP *against* SPEER.

Chambersburg, Saturday, October 6.

IN this case a judgment was entered for the plaintiff, in the Circuit Court of *Franklin* county, on the 4th *October* 1804, with an agreement that the same should be released upon the payment of 6284 dollars 50 cents, due on certain articles of agreement between the plaintiff and defendant for the sale of a tract of land; 2000 dollars to be paid in two months, and the residue to be paid, one fourth in six months, and one fourth at the end of every succeeding six months until the whole was discharged; execution to stay in the mean time. The whole therefore became due on or before the 4th *October* 1806.

If execution is stayed by the agreement of the parties, the "year and day" runs only from the time when such stay expires; and this, whether there is an entry of the *cesset* on the record, or it is a matter of private arrangement out of court. The court will take notice of such an agreement though not on record.

On the 19th *March* 1805, *Dunlop* assigned the judgment to *Peter Everley* and *James Riddle*, in trust to secure to a certain *John Sheller* the repayment of 1600*l.* without interest on the 1st of *April* 1809. On the same day articles of agreement were executed between *Sheller* and *Speer* the defendant, by which the former agreed to lend *Speer* the said sum of 1600*l.* to be repaid on the 1st of *April* 1809, without interest, for the repayment of which *Speer* was to give *approved security;* and in consideration of this and of certain agreements and covenants on the part of *Sheller*, *Speer* covenanted to pay him 275*l.* per annum, on the 1st *April* 1806, and the three succeeding years. *Sheller* covenanted to serve *Speer* during this period in the capacity of founder at his ironworks, and that his son-in-law *James Moore* should serve him in the capacity of a clerk and manager &c., *Speer* paying him 150*l.* per annum. *Sheller* was also to have the option of becoming a partner in the ironworks upon certain terms, after the expiration of eighteen months.

A judgment against *A* was assigned to *B*, to secure money lent to *A*, and which *A* covenanted by articles of agreement to repay on a certain day. The court refused to stay execution upon this judgment, to give *A* time to obtain a verdict against *B* for damages in consequence of *tortious* acts by him in breach of his covenants in the same articles; though it seems they would, if *A's* claim was for money paid, or any other account susceptible of liquidation.

In consequence of misunderstandings between *Sheller* and *Speer*, the former did not elect to become a partner; and the 1600*l.* not being paid, he issued an *habere facias* in *June* 1809, which was stayed by Judge *Yeates*, until the further order of this court.

Accordingly the court now was moved to set aside this

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execution. 1. Because the year and day having elapsed since the stay of execution upon record, viz. the 4th *Oct.* 1806, the execution was irregular, without a *scire facias*. 2. Because *Sheller* having broken his covenant to serve *Speer* faithfully as a founder, by neglecting his duty, and decoying away the servants of *Speer* employed in his ironworks, (of which an affidavit was filed) the court upon equitable grounds ought to suspend the execution, until the damages sustained by *Speer*, could be ascertained by a jury.

Watts and *Duncan*, in support of the motion, contended upon the first ground, that the only *cesset* of which the court could take notice, that upon record, expired on the 4th *Oct.* 1806, from which time the year and day began to run, and that a *scire facias* should have issued to revive it, prior to the execution. It would be a source of endless mischief, if private agreements, of which there was no memorandum in court, could be used to sustain an execution which on the face of it was irregular; though in fact there was no agreement here, the judgment being merely given as a security, which it would be whether revived or not.

On the second ground, they argued that the 1600*l.* and the covenants by *Sheller* ought not to be separated. It was an appeal to the equitable powers of the court to prevent injustice. It was not necessary to disturb *Sheller's* security. He would have that at all events. But it was equity and nothing more, either to put him to his action, when *Speer* might set off his claim under *Sheller's* breaches of covenant in the same articles, or give it in evidence as an equitable defence, or to suspend the execution until *Speer* might try his right against *Sheller*. There could be no doubt that under our act of assembly unliquidated damages in contract might be set off. Unless the motion was granted, *Sheller* would be allowed an inequitable priority in obtaining his demand upon *Speer*, and *Speer* would be inequitably postponed, although both demands arose out of the same articles.

Dunlop and *Brown*, contra, held the first reason to be insufficient, because it was perfectly settled, that any act or agreement of the defendant producing the delay, excused a

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scire facias; and for a very good reason, because the presumption of payment which alone called for a *scire facias*, could not arise under such circumstances. Hence a writ of error prevented the year and day from running; and so an injunction, notwithstanding some old cases to the contrary. *Mitchell* v. *Cue* (*a*), 2 *Saunders* 72. *f.* So also delay by consent of parties. 2 *Bac.* 730., *Execution* H. And it is now immaterial whether the delay appears by matter of record in the court from which the execution issues, or not. The cases of *Booth* v. *Booth* (*b*), and *Winter* v. *Lightbound* (*c*), which decided that an injunction from chancery was no excuse for the want of a *scire facias* in the King's Bench, went upon the ground, that the cause of the *cesset* must appear in the court where the judgment is rendered. But they were expressly overruled by *Mitchell* v. *Cue*. Here it was impossible, by the contract of the parties, to take execution until after the 1st *April* 1809; which was of course an agreement that execution should stay until that time.

The second ground is also insufficient, because the 1600*l.* was wholly distinct from the general design and object of the articles. It was money lent, for which *Speer* was to give approved security; and that security was the judgment. He knew that execution could be taken out. Both parties contemplated this remedy; and therefore it is not against equity for *Sheller* now to use it. But there is another reason against the delay, that in an action by *Sheller*, these damages claimed by *Speer* could not be defalked. The affidavit states that they arise from misconduct of *Sheller*, that is from *torts* done by him. Put it that they are for nonfeasance, or neglect of duty under these articles, they cannot be set-off. The attempt was made in *Howlet* v. *Strickland* (*d*) to plead by way of set-off unliquidated damages arising from breaches by the plaintiff of other covenants in the same agreement on which he brought his action; and the breaches were all for non-delivery of alum; but it would not do. They could not be pleaded or given in evidence even as an equitable defence. *Kachlin* v. *Mulhallon.* (*e*)

(*a*) 2 *Burr.* 660.
(*b*) 1 *Salk.* 322.
(*c*) 1 *Stra.* 301.
(*d*) *Cowp.* 56.
(*e*) 2 *Dall.* 237.

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TILGHMAN C. J. after stating the case, delivered his opinion as follows:

The defendant applies to the court to set aside this execution on two grounds: 1. That the year and day having elapsed, the execution was irregular. 2. That upon equitable principles, the court ought to suspend the execution until it is ascertained by the verdict of a jury what damages the defendant has sustained by *Sheller's* breach of the covenants in the articles of agreement.

1. On this point there is no difficulty. The reason of the plaintiff being put to his *sci. fa.* after the lapse of a year and day, is, that it may be presumed the debt has been paid, since the judgment. A year and day has been thought sufficient time to raise this presumption. But it must be a year and day from the time the plaintiff was at liberty to take out execution. When a stay of execution is given on the record, it never was doubted, but the year and day was to be reckoned from the expiration of the stay. The reason is the same, when a stay has been given by agreement of the parties, not entered on record. For some time the courts were unwilling to take notice of any agreement not on record. But I take it to be now settled, that they will receive evidence of such an agreement. In *Mitchell* v. *Cue and wife*, 2 *Burr.* 660, it is laid down, that where delay of payment has been obtained at the instance, or for the benefit of the defendant, a *sci. fa.* is not necessary. This principle is highly reasonable; and when applied to the fact in the present case, it will prove, that the execution was regularly issued, because a year and day had not elapsed from the 1st *April* 1809, the day given to the defendant for the payment of the 1600*l.*

2. The claims set up by the defendant, arising from *Sheller's* breaches of covenant, are acts of *nonfeasance*, or *malfeasance;* such as neglect of duty, and decoying the servants of the defendant employed in his ironworks, to leave him. If the defendant alleged payment of money, or any thing which in its nature admitted of liquidation, I should think there was strong ground for his motion. But it appears to me, that to stop the execution on the grounds contended for,

would be an extraordinary interference, not necessary, and not consistent with the intent of the parties. The 1600*l.* advanced by *Sheller*, was to be repaid on a certain day, and to secure a punctual payment, this judgment was assigned. Both parties must be supposed to understand the nature of the judgment, and that the plaintiff might inforce payment by execution. I can see no part of the articles, which intimates an intention, that the payment of this money should be blended with the other covenants, or that before payment should be made, it should be necessary to inquire into the performance of the agreement. By accepting this judgment as security for the 1600*l.*, that part of the articles which required security to be given was performed, and thus separated from the other parts. I am therefore of opinion, that if the defendant has suffered damage by the plaintiff's non-performance of his covenant, in the manner alleged, he should be left to his remedy by action on the articles.

YEATES J. I have felt considerable difficulties, in forming my opinion on the present motion. I readily agree, that the execution is not to be set aside because no *scire facias post annum et diem* issued to revive the judgment. The arrangements made by the parties for their mutual convenience, precluded the necessity of such process, and there can be no pretext of surprise in the case. 2 *Burr.* 660.

If the agreement between the defendant and *John Sheller* looked forward to a new security, for the repayment of the 1600*l.* advanced by the latter, then I should be disposed to inquire into the legal consequences which would arise on the security being given. In such case, I think the failure of *Sheller* to perform his covenants, such as his refusing to fulfil the duties of a founder in the furnace, &c. might be given in evidence under the defalcation act to diminish his claim to the 1600*l.* But I do not conceive, that damages arising *ex delicto*, from *torts*, such as bad management as a founder, or the acts of inciting the workmen to quit the employ of *Speer*, could be adduced to defeat the claim of *Sheller*, in a suit founded on this new security. On the other hand, if the parties contemplated the partial assignment of this judgment, as the security to be given under the agreement, then I should

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be of opinion, that any nonfeasance on the part of *Sheller* under his contract, should not be admitted to destroy the effect of the judgment. I have on reflection adopted the latter construction of the articles between the parties, and view *Sheller* in the same light as Mr. *Dunlop*, as to the 1600*l.* secured. We are called upon to interpose our extraordinary powers, in order to prevent injustice being done. It is a case within the immediate discretion of the court; and if *Speer* has suffered by the breach of contract of *Sheller*, or by his tortious acts, he has a full and ample remedy under the agreement, or in a suit adapted to the merits of the case.

I concur that the defendant's motion be denied.

BRACKENRIDGE J. Where nothing is heard from a judgment for a year and day, it is presumed to be satisfied, and it is reasonable that the defendant should have an opportunity of shewing that; and hence the *scire facias*. But where from the stay given no such presumption arises, there is no *scire facias*. Here it is not until after the 1st *April* 1809, that the year and day begins to run, and within the year and day after, the execution issued. It is therefore not irregular on this ground, and cannot be set aside. In the nature of it, was a *scire facias* necessary to ground an execution? Was the plaintiff bound to anticipate the pretence of such a satisfaction, and to give the defendant an opportunity of shewing it? That would be unreasonable, and the plaintiff could not be supposed to know that such a defence would be set up in bar of his execution. It is therefore not irregular on this ground, and cannot be set aside.

But cannot it be stayed with a view to any order of the court? What order have the court a power to make? Where satisfaction is alleged in performing something specified under the judgment, the court can hear it on motion; and if it is of a nature of which they can judge and determine without the intervention of a jury, they will do it. In this case it is clear they cannot. It is not a satisfaction in money that is alleged, nor services, nor property of an ascertained value, in which cases they could by themselves, or auditors appointed, settle the payment made, and the balance due.

But have they the power to direct a *scire facias* by special

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order? I think so. I see no principle of law against it. It is agreeable to the reason of the law on which the *scire facias* is founded. But will they do it in this case? That must be a matter of discretion. It is not the payment of money that is alleged, nor any thing done or performed *eo intuitu*, or directly with a view to satisfaction; but damages sustained under a contract immediately connected with the payment of the money secured by the judgment. How connected? The sum to secure which the judgment was in part given, was money borrowed from the *cestui que use* of the judgment, which by an agreement was borrowed of the *cestui que use* who was to receive wages and do services, which he has not done. He brought a suit on the article for his services, in which suit his default might have been set off, and judgment obtained even for the balance if any found, under the head of damages against him. This was not done, and it is proposed to set it off under the idea of satisfaction to this judgment; and a *scire facias* specially to be ordered to give the defendant this opportunity. It does not appear to me that justice requires that it should be done; or that the defendant will be without redress without such interposition. I am disposed rather to leave him to his action on the article.

Motion refused.

Lessee of BONNET *against* DEVEBAUGH and SMITH.

Chambersburg, Saturday, October 6.

THIS cause was tried before the Chief Justice, at a Circuit Court for *Bedford* county in *October* 1808; and now came before the court, upon an appeal from his decision.

The declarations of a deputy surveyor, that he had made a certain survey under an order from the proprietaries, are not evidence, although he was dead before the trial, and all his official papers had been accidentally burnt, and although in addition to these circumstances, the warrant of acceptance recited that the survey had been made under such an order.

Though such a recital is good evidence against the proprietary, it is not evidence against third persons claiming adversely to the survey, by a title commenced before the return of survey.

Title by settlement and improvement, though at different times it has been in some measure shaken, is now as well established as any species of title in *Pennsylvania*; and very often has been preferred to warrant and survey and patent.

General history of improvements given.

By the report of the Chief Justice, the evidence, so far as is necessary to understand the decision, was as follows:

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The plaintiff claimed title under a survey made for *George Croghan* in 1755, which was not returned to the office of the surveyor-general till the year 1763. On the return of the survey in that year, a warrant of acceptance was issued, in which it was *recited, that a survey had been made in the year* 1755, *by John Armstrong, deputy surveyor, by virtue of an order from the proprietaries;* and on the 28th of *May* 1763 a patent issued to *George Croghan*.

About the year 1755 a war broke out between the *French* and *Indians* on one side, and *Great Britain* and her then colonies on the other; in consequence of which the settlements in that part of the country where the land in controversy lies, were broken up; and this war continued with little intermission till after the time of issuing the patent to *George Croghan*.

In the year 1763 the office of *John Armstrong*, and all his official papers, were accidentally consumed by fire.

The plaintiff produced no warrant, prior to *Croghan's* survey in 1755; but he offered to prove by the deposition of *William Lyon*, that the said *Lyon* had heard *John Armstrong* (since deceased) declare, that before the said survey was made by him, he had received a letter from the proprietary officers at *Philadelphia*, ordering him to make surveys for *George Croghan*, in the *Raystown* settlement, (where the land in dispute lies) or wherever else the said *Croghan* should direct. To this evidence the counsel for the defendant objected. The Chief Justice observed that it was a singular case. That in general the declarations of a deceased person were not evidence; but considering that *Armstrong* had been a public officer, that his official papers had been burnt, and the return of survey had been accepted in the land office, he thought it best to admit the evidence, reserving the point however for the opinion of the Supreme Court, as it was one on which many titles might depend, and seemed worthy of fuller investigation and reflection than it could receive during the trial.

The defendants claimed under, and gave evidence of an improvement right, commenced, as they alleged, by *Thomas Croyle* in the year 1754, and continued with as much perseverance as the war and other circumstances would admit.

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On the 10th *June* 1762, a warrant issued to *T. Croyle* for "100 acres adjoining lands surveyed to *George Croghan*, "and including the said *Croyle's* improvement at the mouth "of the *Snake Spring*." On the 4th of *March* 1768 a survey was made for *T. Croyle* on the said warrant, containing 123 acres and some perches, which did not include the land in dispute; but although that survey did not cover the land in dispute, yet *Croyle* continued to live on the land in dispute, which adjoined the survey; and the defendants gave in evidence the deposition of *Adam Croyle*, son of the said *Thomas*, who swore that he was sent when a young man under age, in the year 1762, by his father, to take out a warrant from the land office for 300 acres; and that when he applied for the said warrant, he was prevented from obtaining it by *George Armstrong* and one *Richard Tea*, through whom the plaintiff derives his title, and who was then a deputy officer in the service of the proprietaries. That the said *Armstrong* and *Tea* alleged that the land had been surveyed for *Croghan*, and in consequence of their opposition, the said *Adam Croyle* could obtain a warrant for no more than 100 acres, with which his father was much discontented, and said he would hold all the land, and expected to obtain justice from the proprietaries.

There was a large mass of additional testimony on both sides reported by the Chief Justice, but the points of the cause will be understood from this abstract.

His honour submitted to the jury three questions on matters of fact. 1. Whether the survey for *Croghan* in 1755 was made in pursuance of an order from the proprietaries, applying with reasonable certainty to the land in dispute. 2. Whether the settlement of *T. Croyle* was commenced prior to *Croghan's* survey; and 3. Supposing it was prior, whether the said *Croyle* had persevered in the continuance of the said settlement with reasonable diligence, making allowance for the circumstances of the war, and also kept up his claim to 300 acres attached to his settlement; or whether he had not abandoned his claim for more than 123 acres contained in his survey on the warrant for 100 acres taken out in 1762. The Chief Justice told the jury, that if they should be of opinion that *Croyle's* settlement was prior to *Croghan's* sur-

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vey, and that he had not relinquished his right to any part of the land to which his settlement intitled him, in such case the defendants' title was better than the plaintiff's, and the verdict ought to be in their favour. So also it ought to be in their favour, although the jury should be of opinion that the settlement was made *after Croghan's* survey but *before* the *return* of it, provided they were also of opinion, that there was no warrant or order from the proprietaries authorizing the said survey, previous to the making of it. But if they should be of opinion that the said survey was founded on an order or warrant applying with reasonable certainty to the land in dispute, and that it was executed prior to the commencement of *Croyle's* settlement, in that case the verdict should be for the plaintiff. So also it should be for the plaintiff, if the jury should be of opinion that *Croyle's* settlement was prior to *Croghan's* survey, but that *Croyle* had relinquished his right to all the land, except that which was contained in the survey made on his 100 acre warrant.

The jury found for the plaintiff, on which the defendants' counsel moved for a new trial; and this motion was immediately overruled by the Chief Justice without argument, that the cause might be brought before the Supreme Court.

The reserved point was now argued with the motion for a new trial by *Todd* and *Watts* for the plaintiff, and by *J. Riddle* and *Duncan* for the defendants.

YEATES J. The defendants have in this instance appealed from the decision of the Circuit Court of *Bedford* county.

It appears from the report of the case, that the plaintiff founded his pretensions to the lands in controversy, on a patent issued to *George Croghan* bearing date 30th *May* 1763, one moiety whereof became vested by divers mesne conveyances in *Jacob Bonnet*, and for which he obtained a verdict. The defendants claimed under an actual settlement and improvement, commenced (as it was said) by *Thomas Croyle* in 1753, and duly continued from time to time, unless when he was driven off by the savages.

The patent is founded on a warrant of acceptance, dated 26th *May* 1763, of a survey made by *John Armstrong* in

1755, which calls for *Thomas Croyle* on the course N. 75° W. 320 perches. This warrant recites, that "by *our consent* "*and direction*, there was surveyed for *George Croghan* "by *John Armstrong* deputy surveyor, a tract of land on "*Snake Spring* in 1753, containing 390 acres 111 perches for "which he had agreed to pay 15*l.* 10*s.* for every hundred "acres, and interest from 1st *March* 1755"—and requires the surveyor general to accept the survey, and return it into the secretary's office.

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No point of law is better established, than that recitals in a deed are evidence against the grantors, and those claiming under them by *subsequent* conveyances, but not against the persons holding under them by *prior* rights, *Gilb. Law. Evid.* 99. 100., 12 *Vin.* 129. 233., 1 *Dall.* 67., *Vaugh.* 74., 2 *Lev.* 108., 1 *Salk.* 286. It clearly follows from hence, that the assertion of the authority, under which the survey was made, either in the warrant of acceptance or patent, does not legally prove that authority, *as to the present defendants*, if they held under a settlement prior thereto.

The counsel of the plaintiff, fully sensible hereof, attempted to establish that fact by the deposition of *Wm. Lyon* esquire, who swore, that "he heard *John Armstrong* say, that he "had received instructions in writing from the proprietary "agents, to survey lands *in Ray's Town Settlement, or such* "*lands as* George Croghan *would shew or direct;* and that "he thought he saw one or two such orders from the afore-"said agents to General *Armstrong*."

The declarations of *John Armstrong*, thus proved, were objected to upon the trial; but the Chief Justice ruled the same to be evidence under the peculiar circumstances of the case, though with hesitation; and at the instance of the defendants' counsel reserved the point for future discussion. The fact was notorious, and it was admitted, that *Armstrong* was the deputy surveyor of the district, and had been dead some years; and that his office with all the papers therein, were consumed by fire at *Carlisle* in 1763. It was agreed, that *hearsay* in general is not evidence against third persons; and that *pedigree* or *custom*, which form exceptions to the general rule upon the ground of necessity, do not come in question here. But it is attempted to distinguish

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the declarations of a public officer who is dead, from those of individuals, upon local reasons.

I cannot bring my mind to assent hereto, *on principle;* and if *precedents* are to govern, I find the point has been determined in a different way. It is not disputed, that the late proprietaries, as the absolute lords of the soil, under their original chartered rights, might at their will and pleasure grant preferences to individuals, who were inclined to purchase any portion of their vacant and unappropriated lands; but having erected a land office for the sale of their lands, all persons complying with the terms held out by the rules or custom thereof, acquired a right to the proportion of land appropriated to their use, not only against other individuals, who might thereafter attempt to appropriate the same land, but even against the proprietaries themselves, unless they had previously and by some act *of notoriety*, evidenced their intention to withdraw such land from the general mass of property, and to appropriate it to individual use. 4 *Cran.* 407., *Penn's Lessee* v. *Kline.* A warrant or order of survey, some written direction or instructions from the commissioners of property, or some one of them, became necessary, to justify the surveyor-general or his deputies, in locating the land applied for, and subtracting it from the bulk of vacant soil. So far am I from subscribing to the doctrine contended for by the plaintiff, that where there is a departure from the common modes of granting lands, there should be any deviation from the established rules of evidence to meet an uncommon or unfortunate occurrence, I feel myself strongly disposed rigidly to adhere to those rules, upon grounds of extended sound policy, and of public welfare. The authority under which surveys are made, is generally to be found in the books of the land office, or at least some entry thereof. Where diligent search has been made, and no official copy of such paper or entry can be procured, after proving that such paper did once exist, an unofficial copy will be received in evidence; and where there is no copy, the contents of the warrant, order, or written direction may be shewn by parol testimony. I am ignorant of any other mode pointed out by the law, to supply the loss of an original paper.

In *Nesbitt's Lessee* v. *Karr and Rankin*, at a court of *Nisi Prius* held in *Huntingdon* county in *May* 1793 before *M'Kean* Chief Justice and myself, it was resolved, that the declarations of the secretary of the land office, could not be received in evidence, and had no legal operation. To admit them, would introduce all the evils intended to be prevented by the act of frauds and perjuries. In *Drinker's Lessee* v. *Holliday* at *Nisi Prius* in the same county in *May* 1796, *Shippen* justice and myself held, that the declarations of the surveyor-general as to what passed at the time of the return of a survey, could not go to the jury. His certificate of official papers was good evidence; but independent facts could only be established by his oath or affirmation, as in the case of other witnesses. And in *Steele and wife's Lessee* v. *Findlay et al.* at a Circuit Court held in *York* county in *April* 1801, by myself and Judge *Brackenridge*, a letter from *Wm. Peters* secretary of the land office, asserting the contents of a paper which he had seen in his office executed by the parties, was overruled in evidence. In all these different instances, the public officer was dead, at the times of the several trials. I might swell the list of cases determined on this head to a much greater extent; but I apprehend, a sufficient number has been cited.

It was contended by the plaintiff's counsel on the argument of the appeal, that *Armstrong and wife's Lessee* v. *Morgan*, tried at *Huntingdon* 18th *May* 1803 before myself and Judge *Smith*, was much like the present in principle, and that the recitals in a warrant of acceptance were in that case held *conclusive* on an actual settler, who occupied the lands prior thereto. This is peremptorily denied.

The dissimilarity between the two cases will appear on a contrast of the evidence. It appears by my notes, that in the *Huntingdon* cause, the plaintiff's counsel, after opening, offered in the first instance to prove, that the land office had been searched with care, and that the smallest vestige of a written order to *John Armstrong* to make the survey in question could not be found. This the defendant's counsel dispensed with; and that fact stood admitted. Two depositions of *Samuel Findlay*, an assistant of *Armstrong*, taken in

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1801 and 1802, were then read in evidence. He swore, that in 1761 he saw written instructions from *Richard Peters* secretary of the land office to *John Armstrong* the deputy of the district to survey for *George Croghan* 4000 acres of land on or about *Aughwic Creek*, and that he surveyed the same accordingly in *November* 1761, agreeably to the written directions of *Croghan*, and annexed a plot to his second deposition made at the time; that one of the tracts surveyed was intended by *Croghan* for *Warder* and *Franks*, one other for *George Ross*, and the third for *John Armstrong*, which included the lands then in controversy. For the survey of this last tract a warrant of acceptance issued in favour of *Armstrong*, dated 8th *March* 1774, which stated that no warrant had previously issued. A patent granted to *James Foley* under the claim of *Warder* and *Franks*, dated 19th *October* 1773, was produced by the plaintiff, which recited, that "the three different surveys had been made for *Croghan* "*by the proprietary's consent and direction.*" It was shewn in evidence, that one *John Price*, well knowing the survey which had been made for *Croghan*, had seated himself on the disputed lands in *March* 1771, cleared between thirteen and seventeen acres of land, erected a cabin and lived therein for three years; that he *verbally* sold his claim including 15 acres of grain then in the ground to *John Morgan* for 30*l.*, in the fall of 1774;—and that about this time *Findlay* informed *Morgan*, that the lands had been surveyed for *Croghan*, and gave him a copy of the draught; and that *Morgan* never claimed the land by settlement, until some supposed mistake had occurred in the returns of survey made for *Croghan*.

Upon this state of facts, it is clear, that the existence of the written order of *R. Peters* being established, and that in all probability it had been burnt with other office papers in *Armstrong's* house in 1763, it was competent to the plaintiffs (after the admitted fact, that no trace could be found of it in the land office on the most careful search) to give oral testimony of the contents of that paper, by a person who had seen and perused it. If any stress was laid by either of the members of the court on the recital in *Foley's* patent, of which I am not at present aware, it could only have been, that it corroborated the oath of *Findlay;* and this too in the

case of a squatter, who knew of the previous adverse right before he went on the land, and whose most inadequate terms of sale to the defendant's ancestor, afforded internal evidence, that he did not hold under a settlement right. Of the legal effect of a recital in a deed, I think it scarcely possible, that either of us could have entertained the smallest doubt.

The defendants' counsel have insisted in their argument, that no right could have vested in *Croghan*, until his return of survey was accepted in the office of the surveyor-general; and have compared his case to that of a shifted warrant or location, if even the written order of survey had been produced on the trial. I am not prepared at present to go to that extent. If we take it for granted, that the testimony of Mr. *Lyon* precisely agrees with the phraseology of the supposed instructions, they cannot with propriety be resembled to a removed or shifted location, adapted to other lands. The expressions "Lands in *Ray's Town Settlement*" though vague in themselves and wanting precision, may be supposed in some degree to answer the lands in question, and the survey in such case if made on vacant lands would complete the contract. The order in one respect might be assimilated to a removed location, that a person by inspecting it in the files of the office, could not tell, to what portion of specific soil the order was applicable; but this is a mischief, to which all indescriptive locations, are more or less subjected. It would seem to be rather of a *mixed* kind and not confined to a particular spot. The words used by Mr. *Lyon* are in the disjunctive. "Lands in *Ray's Town Settlement*, "*or* such lands as *George Croghan* should shew or direct." Under such an unusual species of order, I feel myself disposed to pursue a middle course; and should think, that the title would relate back to the time of survey, *provided* that the same was returned in a reasonable time under all existing circumstances, but not otherwise. Some time must necessarily elapse before a survey made at a distance can be possibly returned to the surveyor-general; and the general practice of deputy surveyors in making their returns would have much weight on my mind in a question of this nature. But I have no hesitation in saying, that a period of eight years

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would be too long a term, to keep back a return of survey under such peculiar circumstances as the present, so as to postpone an adverse title intervening fairly between such survey and return.

Believing myself to be correct in the opinion I have delivered, that the deposition of *William Lyon*, so far as it contains the declarations of *Armstrong*, was objectionable, and inadmissible as evidence in the cause, I proceed to consider, whether the defendants have disclosed such merits, as intitle them to demand a new trial, in the due exercise of the legal discretion of this court. For unquestionably *Croghan* had by his patent of 30th *May* 1763, the exclusive title to these lands, if there was not at that point of time, an elder subsisting preferable claim thereto, which was recognised by the laws and usages of the state.

The defendants allege, that such prior right was vested in *Thomas Croyle*, as an actual settler, and *bona fide* improver; and that they hold under him. Now what are their proofs? On the trial, two witnesses swore to *Croyle's* having erected his cabin in the spring of 1753, three or four perches from the head of *Snake Spring*. Three witnesses attested the removal of his family thither, from *Conococheague* in the following year; and twelve witnesses gave testimony of their seeing him reside in the cabin with his family at different times between 1754 and 1763, and that he cleared land and cultivated the same. But what greatly weighs with me, is, that the very draught of survey made for *Croghan* by *George Armstrong* in 1755 designates *Thomas Croyle* on the course N. 75° W.; and my mind is abundantly satisfied on the whole, that in whatever month of that year the survey was made, *Croyle* was then actually resident on the land, and improving the same as a settler. This then was the inception of an equitable title, preceding any right of *Croghan*, which if duly followed up, would by the benevolence of the late proprietaries, and the settled usage and custom of their commissioners of property, have conferred a right of preemption to 300 acres of land. But as this imperfect right may in the first instance be built on a slight foundation, and may easily be acquired, so may it as readily be forfeited by abandonment.

It has been strongly urged by the plaintiff's counsel, that *Croyle* by his conduct has relinquished all claim of preemption to the lands in controversy, by taking out a warrant on the 10th *June* 1762 for *one hundred acres adjoining lands surveyed to George Croghan*, and including his improvement at the mouth of *Snake Spring;* upon which a survey was afterwards made on the 4th *March* 1768, of 123 acres and 123 perches by *George Woods* for *Richard Tea* deputy surveyor. It is said, that if his settlement really preceded *Croghan's* survey, and he might thereby intitle himself to 300 acres including his improvement, to be laid off in a reasonable shape, yet he was under no necessity to take so large a quantity; and consequently, that he, and those claiming under him are concluded by the lines of his survey. That his warrant expressly calls for lands adjoining *Croghan's* survey.—And this introduces the inquiry, whether *Croyle's* confining himself to the warrant for the one hundred acres, was a voluntary act on his part, or was superinduced by the insuperable necessity of the moment?

A man certainly should be bound by his own acts arising from the freedom of his will, or the uncontrolled acts of his adopted agent. *Adam Croyle*, aged about eighteen years (if he was ten years old, when he came up with the family in 1754) was sent to *Philadelphia* by his father with 5*l.* in *May* 1762, to obtain a warrant for three hundred acres of land including his improvemeat at the head of *Snake Spring*. It is a well known fact, that *Richard Tea* was then a clerk in the employment of the secretary of the land office; and it appears by the evidence, that *Croghan* on the 21st *December* 1763, conveyed to him the lands included in his patent in consideration of 300*l.* *Adam Croyle* testified, that on making application for the warrant according to his father's orders, he saw *George Armstrong* and *Richard Tea* in the office, who objected to his obtaining it, because the land applied for was included in one of *Croghan's* surveys;—that he applied at three different times for the 300 acres warrant, but was always opposed by *G. Armstrong* and *R. Tea*, and could not succeed in obtaining the same; and that on his return to his father, he informed him of what had passed, who thereupon replied, that he was determined to hold the land notwith-

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standing, and added, that he relied on *Penn* for justice. The truth of this relation is powerfully aided by a circumstance of which there can be no doubt. *Thomas Croyle*, notwithstanding the dereliction imputed to him, uniformly kept the possession of the land whereon he had originally improved, built, and resided until his sale to *Robert Elliot* on the 14th *April* 1774, although that portion of the land was not comprehended by his survey: and in his conveyance to *Elliot*, a covenant is inserted, that he would prove his improvement right to be prior to the right or claim of any person whatever. Judging on the whole of *Thomas Croyle's* conduct, I see no just ground to infer an abandonment of any part of his equitable interest under his ancient settlement.

It only remains for me to give my general ideas of improvement rights, their origin, and the doctrines which have obtained at different periods of time respecting them. Some remarks made during the argument impel me to this task, as a duty.

It has frequently been asserted, and considered as a kind of tradition, that the first proprietary by proclamations and advertisements dispersed in foreign countries, invited adventurers to settle on his lands, and encouraged them to emigrate by promises of waiting for the purchase money until it suited their convenience to discharge the same. In the earlier years of my practice at the bar, I endeavoured, in conjunction with the late Judge *Wilson*, to ascertain this fact; but notwithstanding all our efforts, we never found any one, who had seen such instruments, or had heard any credible person assert that he had seen them. And on carefully searching the minutes of the board of property at *Lancaster* since the argument, I can find no circumstance detailed, which would lead me to infer the fact. I allude not to the proclamation of governor *John Penn* of the 24th *February* 1763, previous to the treaty at *Fort Stanwix*. I met with one case in 1702, where a preemption right was granted to *Peter Bezalion*, a settler in 1700.

Mr. *Chew*, when Chief Justice, at *Nisi Prius* in *Carlisle* in *June* 1774 in *Campbell's Lessee* v. *Kidd*, imputed the origin of improvement rights to the uniform usages of the land

office; and asserted, that the encouragement given by the proprietaries and their officers to improvements had clearly expressed their assent to the right of preemption of settlers on vacant lands, and was such a sanction as amounted to an implied contract on the part of the proprietaries, that they would grant the lands to such persons on the usual and common terms: and should the proprietaries refuse the terms so offered to them by an improver, chancery would decree a specific performance.

In *Smith's Lessee* v. *Brown*, at *Nisi Prius* in *Union Town* in *May* 1795, *M'Kean* Chief Justice remarked, that *William Penn* esquire, the first proprietary, died in *England* in 1718, and his son *Thomas* continued in his minority until 1731, and *Richard* his youngest son until 1732. During this interval, their land office was shut up; so that within that time, warrants and patents were not regularly granted by the commissioners of property for transferring lands to applicants. To further the settlement of the then province during this period, tickets signed by one of the commissioners of property, or the secretary of the land office, came into practice; and hence it would seem, sprung improvements. He further observed, that there were three kinds of rights to lands known in this state, the *jus proprietatis*, *jus possessionis*, and *jus vagum* or an *imperfect* right. Settlement might be ranked among the latter species; it was a right to a preemption;—a claim to a favour.—Improvement titles probably derived their origin from both sources.

The most sacred regard has uniformly been shewn, to *bona fide* settlements, by the proprietary agents. When the decisions of the board of property were regularly kept, I have counted from *January* 1766 to *January* 1769 no less than one hundred cases determined on caveats, wherein the improvement doctrine was recognised.

In early times, such claims were considered as mere personalty, and sold as such by executors and administrators in the course of administration. Indeed no ejectments were thought by counsel, to be supportable on them or even upon warrants or surveys, on the mere *jus proprietatis*, until some time about the year 1760.

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In the case of *Campbell's Lessee* v. *Kidd* before cited, Mr. *George Ross* and Mr. *Wilson* of counsel for the plaintiff stated the first recovery which had been known under a mere improvement right, to have been in *Hoover's Lessee* v. *Schreider* in *Northampton* county in *March* term 1769. At *Lancaster Nisi Prius* in *November* 1768, in *Isaac Myer's Lessee* v. *Martin Hefferfinger*, an improvement title in the defendant was established, and took place of a patent. And at *York Nisi Prius*, *May* 1772, in the case of the *Lessee of George Sprenkel et al.* v. *George Stevenson*, an improvement was given in evidence on the part of the plaintiff, though made within the reputed bounds of the manor of *Springetsbury;* and this too against a patent accompanied with a long possession. It ended in terms of compromise. But for half a century at least, lands held by improvement rights, as well as under warrants and surveys, have been uniformly considered as real estates, and subject to all their rules.

The correct idea of an improvement right, before the year 1776 is well expressed in sect. 3 of the act of 30th *December* 1786, 2 *Dall. St. Laws* 487. It was supposed to signify "an actual, personal, resident settlement, with a manifest intention of making it a place of abode, and the means "of supporting a family, and continued from time to time, "unless interrupted by the enemy." I am however strongly inclined to think, that an intention of *immediate residence* was not in some instances deemed so essentially necessary, as it is now held to be. But the *animus residendi* was uniformly thought requisite. Abandonment of the possession without a reasonable cause was always supposed to be a forfeiture of the claim, and though proper allowance would be made for absence upon good grounds, it was held to be incumbent on the party to account satisfactorily for his absence, if he would denominate himself a *bona fide* improver. The doctrine of improvements conduced greatly to the settlement and population of *Pennsylvania;* and happily blended the proprietary interests with those of individuals. Confined within rational bounds, I have always thought the preference given to the improvers of vacant lands, beneficial to the community, and founded on the combined principles of equity and sound policy. It is true, that the opinions of some few

interested persons have degenerated at different periods into wild extremes destructive of the common safety; but they have been corrected and restrained by the sober decisions of the tribunals of justice.

For a few years after the *American* revolution, the sentiments of some of the judges of this court at *Nisi Prius* were unfriendly to settlers and improvers; but a change of opinion took place about the year 1793. Many different acts of the legislature, expressive of the general sense entertained of improvements, had evinced the favourable light in which real settlements were viewed, and were declaratory, as well as confirmatory of former established usage. At length at the courts of *Nisi Prius* held in the spring of 1795, in *Washington* county, in *Howard's Lessee* v. *Pollock* and *Bush*,— and in *Fayette* county in *Cherry's Lessee* v. *Robinson*, (the merits of which cause came on to trial the fourth time) and particularly in *Smith's Lessee* v. *Brown* already cited, wherein the abstract question, whether actual settlers were intitled to preemption by the laws of the state in opposition to a subsequent right expressly created by the laws of *Virginia*, came on to be decided, *M'Kean* Chief Justice, expressed his full concurrence in the ancient improvement doctrine, and the same remains unimpaired to the present day. Numerous instances have occurred in our courts, both before and since the *American* revolution, wherein patents have been postponed to prior actual settlements.

Upon the whole, I am of opinion, that a new trial should be awarded, and that the costs of the former trial should await the event of the suit.

BRACKENRIDGE J. The plaintiff in this case has a legal title. Whether it embraces the possession of the defendant was a question of fact for the jury, who in finding a verdict for the plaintiff, must have found this fact for him; and the judge before whom the cause was tried having sanctioned the verdict by his judgment, it must be taken that, in his opinion, it was according to the evidence; at least not contrary to it. This being the case, and there being nothing shocking or monstrous in drawing such a conclusion of fact from the evidence as reported to us, I do not think it com-

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petent to this court to disturb the verdict; nor am I disposed to do it. To an application on that head I shall be as deaf as the rocks:

Quàm si dura silex, aut stet Marpesia cautes.

The defendant protects himself by an equitable claim of occupancy and possession. And hence the question of priority arises as to the legal title, and equitable claim; whether the legal title shall attach from the date of the survey, or from that of the return.

Whether the title shall attach from the date of the survey, will depend upon there being a precedent authority to make it. It is alleged that there were written instructions in the hands of the surveyor authorizing him to make the survey.

In evidence of this, testimony was admitted of the *surveyor saying that he had written instructions*, the Chief Justice before whom the cause was tried reserving this point for the consideration of this court. It is clear to me on solemn argument, and due deliberation, that even under the *special circumstances of this case*, under which it was admitted, it was not strictly legal evidence, and should have been refused. The surveyor was not upon oath when he made the declaration; and had he been *on oath*, it could not have been admitted, because it is evidence which supposes something better behind, search for which must be first proved to have been made in order to let in this secondary proof. And though the necessity of search in the deputy surveyor's office is superseded by the fact admitted, or proof that his office was burnt, and his papers lost, yet this does not relieve from the obligation of a search in the offices of those, or amongst their papers, from whom the writing of instructions is alleged to have emanated; the *proprietary agents of that time*. All this must have preceded before even the oath of the deputy surveyor, or of any one else, could be admitted of the existence of the writing or its contents.

But it is alleged that the *warrant of acceptance* recites the survey to have been *by the consent and direction of the proprietary agents*. Such recital would be evidence against the proprietary as laid down by the Chief Justice; but would not affect a third person claiming adversely to the survey, and

denying the existence of instructions or writing to that effect preceding the survey. It must be shewn that such instructions did precede the survey by the instructions themselves, or by proof of their existence, by those who had read and knew the contents. Nor could even such instructions existing, and having issued from the proprietary agents, affect a third person unless there had been an entry of them in the books of the land office, so as to give constructive notice to a purchaser, or there had been actual notice. The proprietary himself is bound by the rules and regulations of his office; and he cannot depart from them to the deception of a third person who has a right to inspect the proceedings, and to expect his grants to issue in the usual mode. This has been held out to the public by the establishment of his office, and equity will hold him to what has been held out. The plaintiff's title therefore cannot attach *prior to the return of the survey so as to affect a third person.*

Whether the defendant had a settlement prior to the date of the return will be a ground of inquiry with the jury on the new trial. It will behove the defendant to make out this in order to defend himself. *For in case of a legal title shewn, the burden of proof lies upon the equitable claimant.*

As to the allegation that the defendant by taking out a warrant for 100 acres has abandoned his claim of 300 acres, under his improvement, if the 100 acres is a part of his claim, it is a presumption of it. It is evidence of this to be weighed by the jury. But if, as is alleged, it was because he could not get a warrant for more; or because he was not able to take out a warrant for any greater quantity at that time; or for any other reason, it will weaken, or repel the presumption; but as correctly laid down by the Chief Justice, this will be a fact for the jury.

New trial awarded.

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If the subscribing witness to a bond is *out of the jurisdiction of the court*, and upon diligent inquiry no person can be found within the jurisdiction who can prove his handwriting, the handwriting of the obligor may be proved *Qu.* whether if the handwriting of the witness is proved, that of the obligor ought not to be also.

CLARK executor of CLARK *against* SANDERSON executor of SANDERSON.

IN ERROR.

THIS was an action of assumpsit in the Common Pleas of *Cumberland*, against the executor of *Robert Sanderson*, upon a promise by the testator to pay the debt of his son, which was due upon a single bill to *Clark* the testator of the plaintiff.

The declaration set out the single bill; and upon the trial of the cause, the plaintiff, having proved that the only subscribing witness to the bill had resided about seven years before in *Cumberland* county, that about six years before she was living in *Baltimore*, that inquiry had been made for her in *Cumberland* without finding her, but that no inquiry had been made in *Baltimore*, and finally that diligent search had been made in *Cumberland* for some person who could prove the handwriting of the witness but without effect, offered to prove the handwriting of the obligor. But this evidence was objected to, and overruled by the court, who sealed a bill of exceptions, upon which the question came before this court.

Carothers, for the plaintiff in error, argued that under the facts in evidence, it was competent to him to prove the handwriting of the obligor. The ancient strictness, he said, upon the subject of proof by attesting witnesses, was not founded in very good reason, and was fast wearing away. Another principle of the law of evidence, most reasonable as well as convenient in its nature, had come in to moderate the severity of the old rule, namely, that the best evidence within the power of the party and that the nature of the case would admit of, should be received; and upon this principle there could be no doubt that the obligor's handwriting could be proved, if the subscribing witness were out of the jurisdiction of the court, and it was not in the power of the party to prove his handwriting. This rule is asserted

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by Judge Rush in *Lesher's Lessee* v. *Levan*, (*a*) where at the same time he was contending for a stricter rule of evidence than the majority of the court. It is not necessary that the witness should be in a foreign country, or even out of the state; it is sufficient to let in the other proof, if he is not found, upon inquiry, to be within reach *of the process of the court*. Absence in a foreign country, is sufficient, because the process cannot reach him; so if he is out of the state, as in *Oliphant* v. *Taggart*, (*b*) which is our case; but the reason goes the whole length contended for, whenever he is out of the reach of process. In some instances, it is true, his deposition may be obtained under a commission, but this is a voluntary thing on the part of the witness; and it is of the greatest inconvenience that a party should be forced to attach an original paper to a commission, at the hazard of its loss or spoliation. In fact, the whole system of proof by attesting witnesses has been questioned; and, contrary to *English* decisions, the confession of the debtor has been held sufficient, without even inquiring for the witness. *Hall* v. *Phelps*. (*c*) Proof of his handwriting is doubtless more satisfactory to the mind at all times, than proof of the handwriting of a witness.

Duncan, for the defendant in error, answered, that the rule of evidence was to be taken as it had been established by decision, without scanning too nicely the reason of it. The best evidence of the sealing and delivery is to be obtained from the witness who attested it with his signature. The proof of handwriting of party or witness cannot be equal to this; for if the hand of the witness be proved, still the circumstances of the delivery, which may be material, are not proved. If however he is dead, then his handwriting is better evidence than that of the party, because it is signed in attestation of a sealing and delivery, which are essential to make it the party's deed. The handwriting of the party comes in, therefore, as the most defective evidence, the most unsatisfactory, and a ground is to be laid for it. Death of the witness is one. Absence in a foreign country is another. But no other

(*a*) 2 *Dall.* 96. (*b*) *Bay's S. C. Rep.* 255. (*c*) 2 *Johns.* 451.

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species of absence but this has been held to answer. The old rule required the witness himself, if alive; the modern rule requires him unless abroad; and the relaxation should not be carried further. *Peak. Ev.* 100. The relation of this state to *Maryland*, or the other states, is not that of a foreign country. There is no difficulty in obtaining evidence under a commission to any of them; and at least inquiry should have been made at *Baltimore*, where the witness had resided, to ascertain whether such commission might not have been executed. The rules of evidence should be held sacred. Innovations upon them, are innovations upon private security; and the Supreme Court of New York shew they are aware of this, by confining the principle of *Hall* v. *Phelps* to the very sort of case in which it was ruled, that of a promissory note, and refusing to admit the confession of the obligor of a bond, without accounting for the absence of the subscribing witness. *Fox* v. *Reil.* (*a*)

TILGHMAN C. J. Questions, like that now before us, have occurred at *Nisi Prius*, but have never before been brought into this court. The law has not been settled, and I am glad that an opportunity is offered, of reducing it to certainty. The rule which requires that a bond should be proved by the subscribing witness is founded in reason; because he is the person whom both parties have chosen to bear testimony to the contract. But the nature of the thing admits of very powerful evidence, independent of the subscribing witness. Proof of his handwriting, in case he is out of the way, and proof of the handwriting or confession of the obligor, would be very satisfactory, unless counteracted by other evidence. For a long time, the courts were extremely rigid in insisting on the rule, in case the witness was living. At length it was perceived that this excessive strictness was productive of more harm than good. An act of parliament, 26 *Geo.* 3. *ch.* 57. *sect.* 38., was made in *England*, for the purpose of facilitating the proof of instruments of writing executed in the *East Indies*. Soon afterwards, the courts were of opinion, that where the witness was in foreign countries, proof of his handwriting might be admitted on common law princi-

(*a*) 3 *Johns.* 477.

ples. *Adam* v. *Kerr*, 1 *Bos.* & *Pull.* 360. At length it seems to have been thought reasonable, that where the witness was out of the jurisdiction of the court, proof of his handwriting should be received. 2 *East* 250., *Prince* v. *Blackburn*. This appears to me, on the whole, to be the best rule for the admission of secondary evidence, because it produces the greatest certainty. If the matter is made to depend on the degree of difficulty in procuring the testimony of the subscribing witness, no man will know what the law is. Whether the distance of a thousand or one hundred miles would be sufficient cause to admit secondary evidence, would depend on the ideas of the judge who tried the cause. Nor is there any thing unreasonable in admitting this kind of evidence, when the witness is out of the jurisdiction of the court. The witness cannot be compelled to attend the court, consequently the writing to be proved must be sent to the witness, which is attended not only with inconvenience but some risk of loss; and after all, the jury are to decide whether the secondary evidence is satisfactory. It is always to be understood, that there must be no fraud or collusion in getting the witness out of the way. If any thing of that kind can be proved, his testimony is not to be dispensed with. In the case before us the subscribing witness was out of the state. According to the principle that I have laid down, then, proof of her handwriting was admissible. But this was not to be obtained, although search was made for proof in that part of the state where she had formerly resided. It will often happen, that the handwriting of witnesses cannot be proved, because persons are called as witnesses who reside in the family of the parties, not much accustomed to writing, and whose writing is very little known. What then is the next best evidence? The handwriting of the obligor. I rank the handwriting of the obligor after that of the witness, in compliance with the rule which has been established; although in my own opinion it is more convincing evidence of the execution of the bond by the obligor, than proof of the writing of the witness. When there is no doubt of the writing of the obligor, it is so difficult to account for his name being there, unless he executed the writing, that there will be little doubt of the execution. So important, indeed, is the handwriting of

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the obligor, that I am not satisfied its proof ought to be dispensed with, even where the writing of the subscribing witness has been proved. Considering all the facts stated in the bill of exceptions, I am of opinion, that the evidence offered by the plaintiff in the court below, of the handwriting of *John Sanderson*, was improperly rejected; and therefore the judgment should be reversed, and a *venire facias de novo* awarded.

YEATES J. The primary rule of evidence is, that the law expects the best evidence which it is in the power of the party to produce. Hence it follows, that any instrument with subscribing witnesses ought to be proved by one of those witnesses, who have been called in by the parties to attest the execution thereof. If the person offering the instrument in evidence cannot procure the attendance of the subscribing witnesses, from causes which it is not in his power to remove, as death, absence in a foreign country, &c., he is then permitted to offer secondary evidence, the handwriting of the witnesses. Such is the law, although in fact the handwriting of the party to the instrument would be stronger proof of its execution, than the signature of a witness, who might be prevailed on to subscribe his name, and whose handwriting might be proved in case of his absence by other witnesses. In consequence hereof, several cases occur in the *English* books, where, in addition to the signatures of the witnesses, the judges have required proof of the handwriting of the party. But the decisions on this subject are by no means uniform. See 1 *Peake's Evid.* 100, 101.

The question here is, whether such facts are stated in the bill of exceptions, as would have let in the plaintiffs in error to the secondary proof of the single bill laid in their declaration.

It has been urged, that the execution of the bill might be proved under a commission to *Baltimore*, to which city the witness removed six years before the trial. It is answered, that she could not be compelled to attend there before commissioners, and that sending important documents abroad is always attended with a degree of risk as well as expense. A general rule must be laid down as to witnesses

residing in our sister states, however near to, or remote from the place of trial. It is certain, that the plaintiffs could not inforce her personal attendance from *Maryland*, or even before commissioners there, under the appointment of the court of Common Pleas of *Cumberland* county. As to the witness then, the plaintiffs had no more compulsory power over her, than if she resided in a foreign country. They were then bound to shew, that they had used due diligence to prove her handwriting. This they did use, but without effect, in *Cumberland* county, where she lived before her removal to *Maryland*. I take this to have been the usual course since the *American* revolution at least, and perhaps introduced by the provisions of the recording act of *March* 18*th* 1775. Under the old act of 1715, deeds, previous to being recorded, were to be proved by the acknowledgment of the grantor; or in case he was dead or could not appear, by the oaths or affirmations of *two* or more of the subscribing witnesses. 1 *Dall. St. Laws* 109. *sec.* 23. But under the act of 1775, the deed might be proved by *one* or more of the subscribing witnesses, *Ib.* 703. *s.* 11.; and under section twelfth, "where "the grantor and witnesses of any deed or conveyance are "deceased, *or cannot be had*, the deed may be proved by "proof of the handwriting of such deceased witness or wit-"nesses, or where such proof cannot be had, by proof of the "handwriting of the grantor or grantors." As far as my experience has gone, the practice of courts of justice has conformed to these regulations, when deeds or papers have been offered in evidence on trials; and which I presume corresponds with the late *English* practice. 1 *Bos.* & *Pul.* 360. *Adam* v. *Kerr*, 2 *East.* 250. *Prince* v. *Blackburn*. I am not disposed to innovate or break in upon the rules of evidence, an adherence thereto being of the utmost moment to the common safety. I can see no mischiefs which may result from the propositions I have laid down. If the instrumental witnesses can be had by the person offering the paper in evidence, they or some one of them must shew their attestation by their own testimony. If they cannot be had, and their absence from court can be satisfactorily accounted for, as that they have paid the common debt of nature, that they reside in a foreign country, or what is tantamount as to the

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party, that they *are out of the jurisdiction of the court, not amenable to its process, or beyond its reach*, the next best evidence in the party's power, viz. the signature of the witnesses may be shewn: but if this cannot be done, then inferior legal evidence will be received, namely, the signature of the party, or his confession to that effect. What else can he do? What substantial principle of justice or policy will oblige him to do what in itself is impracticable? It cannot be pretended, that the law enjoins on him this injurious task. Let it be understood, that all I have said goes on the ground that the most honest efforts are verified to the court, to have been used to fulfil the duty which the law enjoins; because otherwise, the general rule of law will not be relaxed in favour of *laches* and negligence. I have no reason to assert that these efforts have not been used in the present instance; and therefore think the secondary evidence should have been received. I am of opinion, that the judgment of the court of Common Pleas should be reversed, and a *venire facias de novo* be awarded.

BRACKENRIDGE J. I consider the rule of calling the subscribing witnesses to a writing, or proving their handwriting, before proof can be let in of the handwriting or even acknowledgment of the maker, as founded upon very questionable reason, and to be restrained in its application. It is founded on this reason. The subscribing witnesses are supposed to be called upon by the person to whom the writing is made, as those on whom he depends to attest it in case of the want of proof; and he must resort to these by his own agreement before he can recur to other proof. Or for another reason, that the person who makes the writing has an interest in having them, as by the act of witnessing they were considered as those who must in the first instance be called upon to prove it; so that if the making was attended with any circumstance that might avoid it in law or equity, it might be shewn.

It might rather be said, and which in the understanding of the people is the case, and is the true reason in fact of calling witnesses, that if the person to whom the writing is made should not be able to prove the handwriting of the maker, or acknowledgment that it is his handwriting, he

might recur to the witnesses or proof of their handwriting; so as to have an enlarged chance of establishing the instrument. In such case the proof of handwriting of witnesses, or maker, might be considered of the same grade, and as all of a nature primary and original. At all events proof of the handwriting of the maker is of equal rank with that of proof of the handwriting of the witnesses. The rule, however, is settled otherwise; but in analyzing the reason of it, and seeing that to be questionable or otherwise, we are justified in amplifying or restraining the application of it. I am therefore disposed to think that the being out of the reach of the process of the court, should be the circumstance on which the letting in what is called the secondary evidence ought to be left to depend; though I should be as well satisfied that proof of the handwriting of the maker could be admitted in the first instance, and that it should be left to the defendant to give notice that he meant to call the subscribing witnesses with a view to make out an equity explaining the assumpsit.

In the case before us, I think enough was offered to be proved, to shew that the witness was out of the reach of the process of the court; or to found a reasonable presumption of it, to satisfy the court that she was not kept back by the person who is said to be bound to call upon her. In that case, I think the proof offered of the handwriting of the maker ought to have been admitted.

But the action was not upon the note with a plea of non-assumpsit going to the making, but to the promise to pay the debt due. The note was collateral to the promise or undertaking of the third person. The plea of non-assumpsit goes to the promise to pay the debt, not to the debt being a debt or not. That would seem to have been admitted by the undertaking. It is the debt which *John Sanderson* owed to the plaintiff that is undertaken to be paid. In this case I think the note of *John Sanderson* subscribed with his name, and that handwriting proved, would be admissible to establish the identity of the writing purporting to ascertain the debt, and which was undertaken to be paid, as it is made a part of the bill of exceptions, and stated in it that the bill offered in evidence is *the same which is set forth in the declaration*. Had

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it been intended to put the making of this note in issue, the plea might have given notice of this. But it is the promise to pay that note or bill, not the making it, that any one would understand to be the matter to be proved. It is taking the plaintiff by surprise, to hold him to proof of what was not directly in issue, at least to hold him to the strictness of the rule of calling the subscribing witnesses. It is as if a man had undertaken to deliver a specific thing; any proof that would go to establish the identity of the thing, might be given. I will admit that I find it difficult to explain myself satisfactorily on this subject, and get over the application of the rigid rule to this particular case; but it would seem to me that it works a general inconvenience to carry the application to a collateral promise to pay a bill specified or owed by any one; and would obviously do great wrong in this case, where there is no pretence of fraud in making the bill. It does not appear from the pleading, or any thing suggested in the bill of exceptions, that there was a defence to the bill itself, but solely to the promise to pay it. I think, therefore, it might have been admitted, and am of opinion to reverse the judgment.

Judgment reversed, and *venire de novo*.

END OF SEPTEMBER TERM, SOUTHERN DISTRICT, 1810.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

Eastern District. December Term, 1810.

3b 201
5b 339
5b 386

1810.

SMITH *against* BROWN.

Philadelphia, Thursday, December 20.

RULE to shew cause why the defendant should not be discharged on common bail.

If a debtor is discharged from a debt by the law of the state or territory where it was contracted, and the creditor resides in *Pennsylvania* and arrests him here, the rule is to discharge him on common bail, if the state where the debt was discharged, extends the same courtesy to citizens of *Pennsylvania*; and it will be presumed that it does, until some reason is shewn to the contrary.

Upon the return of the rule, *Wallace* for the plaintiff produced a positive affidavit of debt upon a bill of exchange drawn by the defendant at *New Orleans*, where he resided, upon his correspondent in *Philadelphia*, in favour of the plaintiff who was a resident of *Pittsburg*.

The defendant relied upon a discharge from his debts since the date of the bill, under a law of the territory of *New Orleans*, in the nature of a bankrupt law.

Chauncey for the defendant contended, that according to the uniform practice of *Pennsylvania* since the case of *Millar* v. *Hall*, (*a*) he was intitled to have the rule made absolute. The reasoning of the court in that case went much further than it was necessary to go here; but limiting that decision, as perhaps it ought to be, by the facts, it would still fit the present case in every particular; for the debtor, in both cases, was discharged by the bankrupt law of the place where the debt was contracted, and where he resided. That rule

(*a*) 1 *Dall.* 228.

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had been followed by this court, in *Thomson* v. *Young*, (*a*) and in *Donaldson* v. *Chambers;* (*b*) and in the state of *New York*, whose courts seemed much disposed to limit the operation of a territorial discharge, the decisions nevertheless recognised the efficacy of a discharge under such circumstances as the present. *Vanraugh* v. *Vanarsdaln*, (*c*) *Smith* v. *Smith*. (*d*) It had in fact been treated as one of the federal obligations of the states, to give effect to such discharges, and to screen the bankrupt debtor behind them.

Wallace for the plaintiff, answered, that the principles asserted in *Millar* v. *Hall* were so repugnant to the decisions in *England* and in other of the *United States*, and they had been impeached so directly in some subsequent cases, that the court ought to put the party to his plea, and not decide so important a point in this summary way. It had been so done by the Circuit Court of the *United States* in *Knox* v. *Greenleaf*, (*e*) and it was the regular course, unless the ground of discharge was too plain for a question. In *Millar* v. *Hall* the court conceived themselves bound to decide as they did, by the law of nations, and the reciprocal obligations of the states. They go upon no other ground. But the law of nations does not authorize one country to bind by its laws both persons and property situated in another; and it is a principle of law that the debt follows the person of the creditor; so that in *Millar* v. *Hall* the law of nations looked quite another way. As to the obligations of the states, the constitution requires no more than that they shall acknowledge *extra territorium* the authority of legislative acts, over such persons and things as were within their legitimate control; and it is merely begging the question to say that they bind a creditor residing in another state. The authority of that case was directly impugned in *Greenough* v. *Emory*; (*f*) and even, if it must be considered as law in *Pennsylvania*, it cannot affect this case, because *New Orleans* is not a state, and cannot claim that deference to the laws, which it is said the constitution secures to those of the states. If reciprocal obligation is the ground of the motion to the court, it should

(*a*) 1 *Dall.* 294. (*c*) 3 *Caines* 154. (*e*) *Wallace's Rep.* 108.
(*b*) 2 *Dall.* 100. (*d*) 2 *Johns.* 235. (*f*) 3 *Dall.* 369.

appear, which it does not, that *New Orleans* acknowledges and respects this obligation.

Rawle in reply, said that it was only necessary to bring this case within *Millar* v. *Hall*, as his colleague had done; for that adjudication had been so implicitly followed in the state courts of *Pennsylvania*, that it could not now be disturbed, without weakening the authority of judicial precedents in every case. Its effect could not be evaded, except by shewing a distinction between that case and the present, which he thought had not been done; for by the treaty of cession, of the 30th *April* 1803, the *United States* stipulated that the inhabitants of *Louisiana* should be admitted into the union as soon as possible, according to the principles of the federal constitution; and the act of 26th *March* 1804, for erecting the ceded country into the territory of *Orleans*, and the district of *Louisiana*, authorized the former to pass all laws not repugnant to the constitution and laws of the *United States*. 7 *U. S. Laws* 113. So that this territory must be considered as intitled, even in its inchoate connexion with the *United States*, to take the constitution as the measure of its rights and of the respect to be paid to its laws. As to reciprocity, the court will presume reciprocity, unless the contrary appears. We have no positive information on that head.

TILGHMAN C. J. The rule of this court has been, since the case of *Millar* v. *Hall*, to discharge on common bail, unless the state, under which the discharge was given, refuses to extend the same courtesy to the citizens of this state. But I think it fair to presume, unless some reason is shewn to the contrary, that such courtesy is extended; and such has been the course hitherto pursued by the court, where discharges have been pleaded under the laws of our sister states.

PER CURIAM.

Rule absolute.

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Philadelphia, Saturday, December 22.

An agent neglected to effect insurance according to a letter of instructions which stated that the owner *valued* the vessel at 4000 dollars, three fourths of which sum he wished to be insured. *Held* that he was answerable as in the case of a valued policy, although the letter contained no precise order to have the policy valued.

MINER *against* TAGERT and SMITH.

THIS was an action upon the case against the defendants, for neglecting to effect insurance for 3000 dollars upon the brig *Montgomery*, belonging to the plaintiff, from *Newbern* to *Cape Francois*, with liberty to touch at one or more ports in *Hispaniola*, against all risks.

The cause was tried under the general issue before Mr. Justice *Yeates*, at a *Nisi Prius* in *July* last, when it was proved that the vessel was greatly damaged by bad weather on the voyage, and that she was forced to put into *Port-au-Prince*, where she was surveyed, condemned as being unworthy of repair, and sold for 825 dollars.

The defendants admitted their liability to answer in the same manner as insurers, and put their defence upon two grounds: 1. The unseaworthiness of the brig. 2. The inferior value of the vessel, which they said was much below the amount directed to be insured.

Upon the first point the evidence was various, and in some degree contradictory. Upon the second, the plaintiff claimed to recover the whole amount, as upon a valued policy, under the letter of instructions to the defendants, which was as follows:

Newbern, June 6, 1801.

Messrs. TAGERT and SMITH.

Gentlemen,

At the request of captain *Stephen Miner*, I wish you to have insurance made on his brig called *Montgomery*, burthen 111 tons, commanded by himself, from the port of *Newbern* (where she now lies ready loaded to sail the first fair wind) to *Cape Francois*, with liberty to touch at one or more ports in *Hispaniola*, against all risks. The brig is strong and loaded entirely with lumber, therefore conclude the premium cannot be much. Whatever it may be, charge it to my account, and advise thereof. The brig *he values at* 4000 *dollars, but wishes to have* 3000 *(say three fourths) only insured.* He may write you from the *W. I.* requesting insurance home; if so,

please have it done agreeably to his direction, which you may also charge to me.

Gentlemen, your obt. servt.,

GEO. ELLIS.

A witness on the part of the defendants swore, that the brig was worth about sixteen or eighteen hundred dollars, when ready for sea; that she originally cost the plaintiff but one thousand dollars, and at that price the witness thought her a hard bargain.

Mr. Justice *Yeates* referred the question of seaworthiness to the jury, after expressing his opinion that the weight of testimony was with the plaintiff. Upon the second point, his charge was as follows:

It is objected that the brig was directed to be insured greatly beyond her value, and that the recovery must be proportioned to this value. This court have said, that where a policy has been effected as a mere cover for a wager, there can be no recovery, as it impugns the first principles of insurance, which rest on a fair indemnity. If a policy had been subscribed, we could judge by inspecting it, whether it was open or valued. The amount of a valued policy is not inquired into, unless the valuation is grossly enormous, as in the instance of the cable put by lord *Mansfield*. The insurer assents to the valuation, and receives his premium thereon. Whose fault is it, that a policy does not exist here? Clearly the defendants'. We must then consider the letter of *Ellis* of the 6th *June* 1801, as expressed in the policy. The plaintiff therein "*values*" his vessel at 4000 dollars, and desires an insurance to be effected on three fourths of her, say 3000 dollars. His intention was communicated, that it should be a valued policy, and the defendants are bound by it. If the brig was not seaworthy when the risk attached, the verdict should be for the defendants. But if she was fit for sea in a common voyage, and the policy intended to be valued, then the plaintiff is intitled to the sum ordered to be subscribed, with interest, deducting the premium, and the price she was sold for at *Port-au-Prince*.

The jury found a verdict for 2978 dollars 55 cents, which was upon the footing of a valued policy, allowing to the de-

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fendants, in addition to the deductions mentioned by the court, one half of one per cent., as if they had made the insurance, and two per cent. for collecting and paying over the money.

Tilghman for the defendants, moved for a new trial. He contended that the verdict was against evidence upon the point of seaworthiness; but the judge who tried the cause, having expressed his opinion to the contrary, he left that question for reconsideration without further argument. The principal ground of his motion, was the valuation. If the defendants were to answer as underwriters upon an *open* policy, the jury were wrong by at least fifteen hundred dollars; and this, he argued, was the measure of their responsibility, because the letter of the 6th of *June* did not say whether an open or valued policy should be made. The defendants, therefore, were not bound to make a valued policy; for if any policy had been effected, it would have complied with all the directions that were given. To say, that they must answer as under a valued policy, because the owner's agent has said that he valued the vessel at a certain sum, is not only adopting the severest possible construction against the defendants, but it is making the owner's opinion operate as an order, whereas sufficient effect would be given to it, if it were understood to imply, that the owner was so well satisfied with the vessel and the risk, that he was willing to be the insurer of one fourth himself. But what injury would have been done by insuring in an open policy? If the plaintiff recovered the real value of his loss, he could not be injured; and as the present is an action for damages to the extent of his injury, it follows that the real value of his loss is the measure of the damages. Every policy is open, unless the contrary clearly appears; every order for insurance should therefore be deemed an order for an open policy, unless a valuation was clearly required.

Hare and *Ingersoll* for the plaintiff, answered, that they were willing to treat the letter as an order for insurance, presented to an underwriter, and accepted. Could any one doubt in such a case that it would amount to an agreement between the parties that the vessel should be valued? The

simplest and most reasonable rule of construction, is to allow some weight to every expression. What is to be done with the appropriate word "*values*," upon the defendants' argument? Why insert it in the letter? Why also the direction to insure three fourths? Surely the owner went upon the basis of a valuation in giving this instruction; for had he intended an open policy, he would have ordered 3000 dollars upon three fourths of the brig, without saying any thing of her value. Suppose a safe arrival of the vessel. Would it have been practicable for the plaintiff to have refused the payment of a full premium, upon the ground that she was not worth 4000 dollars? The defendants having been bound to effect the insurance, and having neglected to do it, the plaintiff is intitled to the most beneficial construction of the letter; and having given his own valuation in the letter, to which no objections were made, he ought not to be deprived at this day, of the benefit and convenience of a valued policy.

TILGHMAN C. J. having been of counsel with the plaintiff, while at the bar, gave no opinion.

YEATES J. Two reasons have been assigned as grounds for a new trial in this case. 1. That the brig *Montgomery* was not seaworthy at the time of sailing from *Newbern* in *North Carolina*, on the voyage intended to be insured. 2. That the jury were charged by me, and actually found their verdict, as if the insurance had been made on a valued policy.

The first ground was not pressed on the motion for the new trial, but a desire was expressed, that the evidence on that point should be reconsidered. I have maturely considered that evidence, and see no reason for retracting the opinion, which I formed on the trial. I am fully satisfied, that the weight of the testimony, both positive and presumptive, preponderated much in favour of the seaworthiness of the vessel. The question was fairly submitted to the jury.

2. The action was brought against the defendants as agents and factors, for neglecting to insure 3000 dollars on the brig pursuant to the orders of *George Ellis* the plaintiff's correspondent, although they had ample funds in their hands for that purpose. Their liability in damages was fully admitted

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in their letter of 29th *October* 1801, and candidly conceded by their counsel upon the trial. It is also admitted on the other side, that the defendants may legally avail themselves of every defence, which underwriters might urge in case they had subscribed the policy. From the words made use of in a policy, we are enabled to ascertain, whether it is to be denominated a *valued* or *open* one. We have no such instrument here to judge upon. The basis of the suit is the negligence of the defendants in not procuring a policy to be effected. Our judgments therefore can only be formed from the expressions contained in the letter of *Ellis* of the 6th *June* 1801 directing the insurance to be made. After directing the insurance and describing the vessel, her burthen, and the meditated voyage, he says, "Charge the premium "to my account, and advise me thereof. The brig he (*Miner*) "*values* at 4000 dollars, but wishes to have 3000 dollars (say "three fourths) insured." It is true, the writer does not order a *valued* policy, *eo nomine*, to be effected; but we may collect his meaning from the plain import of his words, and whatever may be determined to be his fair meaning, will fix the extent of the defendants' responsibility. The insurance was to be made on three fourths of his *valuation*, and this necessarily conveys the idea, that he wished for a *valued* policy. By adopting the construction contended for by the defendants' counsel, we render the words *he values* &c. wholly inoperative. If the brig had reached her destined port in safety, and she had been insured at 4000 dollars, when in reality, she had been worth but 2000 dollars, the plaintiff could never expect a return premium.

In fact, the jury have not awarded the full damages as on a valued policy. Making a deduction of three fourths of what the brig sold for in the *West Indies*, the premium and every customary allowance made to underwriters, it will be found that the balance and interest thereon will surmount the sum found between three and four hundred dollars.

I think therefore the defendants have no reason to complain of any injustice done to them, and that judgment be entered for the plaintiff on the verdict.

BRACKENRIDGE J. concurred.

New trial refused, and
Judgment for plaintiff.

3b 209
6b 32
3s r387
3s r498
5r 254
36 474

1810.

HERTZOG *against* ELLIS.

Philadelphia, Saturday, December 22d.

CHAUNCEY for the defendant, moved for a rule to shew cause why the execution in this case should not be set aside, the judgment opened, and the proceedings under the rule of arbitration rescinded, upon the following facts:

Immediately after special bail is entered in compliance with a notice, either party is intitled to enter a rule of arbitration, though before the return day of the term of which the suit is docketed. And in all cases a suit is *entered* within the meaning of the arbitration law, from the moment it is placed on the docket of the prothonotary.

On the 24th of *August* 1810, special bail was entered by the defendant, in consequence of a notice from the plaintiff's attorney, under the act of 20th *March* 1724-5. 1 *St. Laws* 223.

On the 29th of *August*, the plaintiff's attorney entered a rule for the appointment of arbitrators on the 10th of *September*, and they were accordingly appointed in the absence of the defendant. The arbitrators awarded 531 dollars and 82 cents in favour of the plaintiff on the 27th of *September*; and on the 8th of *December*, his attorney issued a *fi. fa.* returnable to the present term.

Chauncey contended that all the proceedings subsequent to the entry of special bail were irregular, because in legal contemplation the action was not entered until the term succeeding the notice, namely the present term, and therefore the plaintiff was not intitled to a rule of arbitration at the time when his attorney entered it. The plaintiff derives his right to this rule, exclusively from the act of 19th of *March* 1810, which allows it only after the entry of the suit or action; and whether regard be had to the peculiar mode of instituting suits by notice to enter special bail, to the expressions of the legislature, or to the mischievous consequences which flow from such proceedings as the present, it will appear perfectly plain that the action was not *entered* until the succeeding term.

The notice to enter special bail is a privilege to freeholders in exclusion of the writ of *capias*. It is intended to supply to the plaintiff the place of a *capias*, as to the matter of bail, and to serve as a substantial benefit to a freeholder by taking away his exposure to arrest, leaving him at the same

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time in the possession of all his rights. It is not meant as a more severe or a more prompt remedy for the plaintiff, but as a more lenient though equally efficient process against the defendant. It is a mere substitute for a *capias*. If a *capias* had issued in this case, no one can pretend that the action would have been in court, before the return day and appearance; or that it would have been *entered* within the meaning of the legislature, until that time. Where then is the ground for saying that it is *entered* at an earlier period, if the mere substitute of a *capias* is used? The notice is always as of the next term; the requisition is to appear as of the next term; the bail is to be entered as of the next term; and therefore in contemplation of law, there is no cause in court until the next term arrives. The recognisance of special bail is not the entry of the action, nor has it more effect than it would have, if it were entered before the return day of a *capias*, in discharge of bail to the sheriff. The bail could not surrender the principal before the return day, and in fact the court have nothing to do with the defendant, until that time. *Newton* v. *Lewis*. (*a*)

The act contemplates the defendant's being regularly in court, before the rule can be entered. The first section directs the rule to be served upon the party his agent or *attorney*, which supposes the party to be in court by attorney. The sixth section treats the cause as one depending in court, by directing that the arbitrators shall reside in the county where the cause or suit is *pending*. The eleventh section gives the party an appeal to the court in which the cause was *pending* at the time of the rule of reference. And the twentieth section authorizes the prothonotary to enter a rule for taking the depositions of witnesses according to the subsisting practice in the courts of the commonwealth, which can only be after the return day of the writ. All these provisions are certainly sufficient to countervail any argument which can be drawn from a literal interpretation of the phrase "*entry* of such suit or action."

A different construction overturns the whole order of judicial proceeding. The judgment and declaration must always be of some term, and the *fi. fa.* should be tested of a

(*a*) *Barnes.* 88. 8 *D.* & *R.* 457. *note.*

term at least while the suit was in existence. But here the process, declaration, judgment and execution all precede the first term, before the cause is in court, and the *fi. fa.* is tested of a term when there was no such cause. No good purpose can be answered by such a construction of the act. It gives a more expeditious remedy against a freeholder, a privileged person, than against any other, which the law could not possibly have intended; and it defaces and destroys the symmetry of judicial proceedings, which is as essential to their justice as it is to their beauty.

Philips for the plaintiff insisted, that it was not a question at this time whether a wise thing had been done by the legislature in the passing of the arbitration law, or whether they had paid a proper respect to the ancient and convenient order of judicial proceedings, but whether the act authorized the plaintiff to enter a rule of reference as soon as special bail was filed. Nothing, he said, could be more explicit than the law. It enacts "that from and after the first day of *May* next, "it shall and may be lawful for either party, his her or their "agent or attorney, in all civil suits or actions pending, or "that may hereafter be brought in any court of this com- "monwealth, having either original or appellate jurisdiction "of such suits or actions, to enter at the prothonotary's of- "fice, *at any time after the entry* of such suits or actions, "excepting appeals &c. a rule of reference &c." What is the *entering* the action? In more than one part of the law, the word is used in the same sense as *bringing* or instituting an action; and in the strictest legal understanding of the language, an action is *entered*, *brought* or instituted, the moment it is placed on the docket of the prothonotary. If it is brought by summons or capias, the *exit* of the writ is the date of entering the action. If it is instituted by notice to enter special bail, then as no record is made of the suit, until the recognisance of bail is taken, the date of the recognisance is the entering of the action. The moment the prothonotary has a minute of it on his docket, the suit is brought, and the arbitration law comes into operation. The case is much stronger where bail is given, than in the case of ordinary process; for according to our practice the party is in court

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from the time of bail entered, and he may be surrendered before the return day of the writ. [TILGHMAN C. J. Has such a practice been recognised? If it has passed *sub silentio*, it is nothing. YEATES J. Such a practice has obtained; but a question on it has never been raised, nor has it been judicially recognised.] The practice may be considered as within the view of the legislature; but whether or not, notice and the entry of special bail, are a well known and recognised mode of *entering* or commencing an action. As to the confusion which so prompt a proceeding, as the present, makes upon the record, it is no greater than is made by a confession of judgment under warrant of attorney, or without warrant before the first term, as is frequently the case.

TILGHMAN C. J. The plaintiff in this cause gave notice to the defendant previous to the commencement of the action, that unless he entered special bail by a certain time, a *capias* would be issued against him. This is a practice peculiar to *Pennsylvania* under an old act of assembly. The defendant entered bail, whereupon the plaintiff immediately entered a rule of reference, and conducted the proceedings so speedily, as to obtain judgment and issue execution returnable to the term next succeeding the commencement of the action. The question is, whether this proceeding was regular. It depends upon "the act regulating arbitrations," passed 20th *March* 1810. The first section of this act, declares, that it shall be lawful for either party, to enter at the prothonotary's office, at any time after the *entry* of the action, a rule of reference &c. The only point is, what is the *entry* of the action? The defendant's counsel has pointed out many difficulties, and inconveniences, that may result from entering the rule of reference, prior to the term succeeding the bringing of the action. If I considered myself at liberty to alter the law in order to prevent inconveniences, his arguments would have great weight with me. But upon examining the act, I cannot bring myself to doubt about its meaning. The action is *entered* from the time that it is placed on the prothonotary's docket. The *entering* or *bringing* the action is one thing; the appearance in court another. The first proviso in this same section shews that the

legislature distinguish between the *bringing* of the action, and the first term *after it is brought*. Indeed the distinction is manifest. Where the reference is entered before the first term, the suit may be carried on without appearing in court at all. In the case now before us, the rule of reference was not entered till after special bail was given. It would be extraordinary indeed, if bail could be given before the *entry* of the action. But I ground my opinion, not on the entry of bail, but on what I conceive to be the plain meaning of the words *entry of the action*. It is best that the public should be informed as early as possible, of the construction given to the acts of assembly by the courts of justice, in order, that if there are defects, they may be remedied. My opinion is, that the reference was regularly entered; and therefore the rule to shew cause must be refused.

YEATES J. The question raised in this case rests on the construction of the first section of the "Act regulating arbitrations" passed on the 19th *March* 1810.

The suit originated on a promissory note, by a notice given under the law passed 20th *March* 1724-5 (intitled "An Act to "regulate the practice upon writs of summons and arrest") to the defendant to enter special bail. The defendant entered such bail on the 24th *August* 1810. On the 29th of the same month the plaintiff expressed his determination to have arbitrators chosen on the 10th *September* then next ensuing. Arbitrators were appointed accordingly on that day, the defendant not attending according to notice, who have filed a report for the plaintiff for 531 dollars and 82 cents, upon which judgment has been entered, and a *fieri facias* has issued returnable on the first day of this term. A motion has been made to set aside the execution, judgment, and rule of arbitration, upon the ground that the rule could not be legally entered until the first day of the term, to which a summons or capias could be returned served, or the defendant arrested.

The words of the law are, "it shall and may be lawful for "either party in all civil suits or actions *pending*, or that may "*hereafter be brought* in any court &c. to enter at the pro-"thonotary's office a rule of reference &c." Whether the

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rule has been obtained prematurely, or not, must depend on the meaning of the words *pending* or *that may hereafter be brought*. It may be said, that according to the common acceptation of the term, an action may be considered as *brought*, immediately after mesne process has issued; but the legal idea seems to be different as we find it in our books. An action does not *commence* till the defendant makes his appearance, which is not till bail filed. 1 *Sid.* 373. No action can be depending, or declaration filed, until the defendant be in the custody of the marshal, which is bail filed. 2 *Lev.* 13. The entry of the bail gives the court jurisdiction. 1 *Vent.* 135. See also *Carth.* 114.

I rather think the expressions in the act are to be construed according to their legal sense. It seems highly incongruous to take a rule upon a party, before he has appeared. But when he has entered special bail, the jurisdiction attaches; and I take such a case to be within the plain words, and meaning of the law. Demanding an arbitration before the service of process, strikes me as a novelty.

But it has been objected, that by proceeding in this mode, the party obtains a more expeditious remedy, than if he had originated his suit by summons or capias. If this be really objectionable, it may be obviated by the defendant's refusing to enter special bail, and being brought in by process.

It is further objected, that the method of procedure in this instance pursued, destroys the orderly course of judicial proceedings, inasmuch as the *fieri facias* being tested as of the last term, necessarily precedes the day when the judgment was entered. But this seeming incongruity is tolerated in many cases. Where a judgment is entered in vacation, the same remark applies as to the *teste* of the execution issued thereon; and where a bond or note falls due in the vacation, the mesne process to bring in the defendant bears *teste* as of a day previous to the day of payment expressed in such bond or note.

I am of opinion, that the defendant take nothing by his motion.

BRACKENRIDGE J. said he had no doubt that the entry

of the action intended by the act of assembly, was the entry on the docket; and of course that a rule of arbitration might be taken out at any time after such entry upon the docket of the prothonotary.

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Rule refused.

3b 215
74 404
96 36

KERLIN and others *against* HEACOCK.

IN ERROR.

Philadelphia, Saturday, December 22.

THIS was an action of trespass brought by *Heacock* the plaintiff below, against the defendants, for taking his goods on two executions. One of the defendants, *Kerlin*, was the justice of the peace who issued the executions, another the constable who served them, and two others the plaintiffs in the executions. The defendants pleaded "not "guilty with leave to justify."

On the trial of the cause in the Common Pleas at *Delaware* county, the plaintiff gave the executions in evidence, and the defendants insisted that this evidence justified them. But the court declared their opinion in the charge, that although the constable might justify under the executions, yet the other defendants could not without shewing the judgments on which they were founded; and they were also of opinion, that in this case the constable could not justify without shewing the judgments, because he had joined the other defendants in their pleas, instead of severing in his defence. To these opinions the defendants tendered a bill of exceptions.

Dick for the plaintiffs in error, argued, that it is not necessary to shew the judgment, when the action is brought by the original defendant, although it is otherwise if the suit be by a stranger. *Lake* v. *Billers et al.* (*a*) is in point, Lord *Holt* there ruled that if the trespass was brought by the person against whom the *fieri facias* issued, the sheriff

The short entry of "not guilty "with leave to "justify," by two or more defendants, may be considered a several justification by each defendant.

In trespass by the defendant in an execution, against a justice of the peace, a constable, and the plaintiffs, the constable may justify under the warrant without shewing the judgment, if there is a several justification by him.

Qu. Whether if the plaintiff in the suit give the justice's warrant in evidence, the constable is not justified by it, without having pleaded a justification.

(*a*) *Ld. Ray.* 733.

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need not shew a copy of the judgment. The same point in *Martyn* v. *Podger*. (*a*) The Common Pleas were therefore wrong in requiring proof of the judgment in this case.

But clearly the constable was justified by the warrant. The act of 21st *March* 1772, 1 *St. Laws* 604., is very express, that in an action of trespass against the constable together with the justice, the constable shall be acquitted upon shewing the warrant, notwithstanding there may be a defect in the justice's jurisdiction. *Sec.* 6. And the court will consider the short entry or minute on the docket, as being a several justification by each defendant. "Not guilty" is as much a several as a joint plea. It should be taken either way according to the justice of the case; and then, even without the "leave to justify," the constable could give the warrant in evidence under the general issue. But at all events he may under this leave, which is as several as the general issue.

Edwards for the defendant in error. Although a sheriff may justify against the original defendant, by virtue of the execution, and without shewing the judgment, yet even he cannot do it against a stranger. This is the decision in *Lake* v. *Billers*, and *Martyn* v. *Podger*. But a justice of the peace can in no instance justify, without shewing his judgment, and the regularity of his proceedings. It would be monstrous if he could; for his own wrong would then be his excuse. So are *Britton* v. *Cole*, (*b*) 2 *Esp. Dig.* 103. 426.

Supposing the plea of justification to be joint, it is settled, that if it is bad as to one, it is bad as to all. In *Rowe* v. *Tuttle*, (*c*) the law is admitted by the court. So also in *Moravia* v. *Sloper*. (*d*) And it is expressly decided in *Smith* v. *Bouchier*, (*e*) and in *Middleton* v. *Price* (*f*). The only questions then are, whether here was a joint justification, and whether the evidence could be given under the general issue. The justification was joint, because it was one plea by all the defendants. If defendants intend to sever, they put in their pleas separately; if jointly they put in one plea. There is no difference between a several and a joint plea in our practice,

(*a*) 5 *Burr.* 2633. (*c*) *Willes* 14. (*e*) 2 *Stra.* 993.
(*b*) 1 *Salk.* 408. (*d*) *Willes* 30. (*f*) 2 *Stra.* 1184.

unless this is joint. The plea of not guilty did not intitle the constable to justify. By the 7 *Jac.* 1. *ch.* 5. justices and constables who are impleaded for any matter done by virtue of their office, may plead the general issue, and give any special matter in evidence to the jury, which, if pleaded, had been a discharge in law; but the *Stat.* 24 *Geo.* 2. *c.* 44., from which our act of assembly is copied, makes no provision as to the pleading, and it therefore depends upon general principles.

TILGHMAN C. J. after stating the case delivered his opinion as follows:

By the act of 21st *March* 1772, 1 *St. Laws* 604., where an action is brought against a constable for any thing done in obedience to a justice's warrant, it is necessary to make the justice a party to the suit; and the act directs, that "on "proof of the warrant the jury shall find for the constable, "notwithstanding any defect of jurisdiction in the justice;" but it is not said expressly, whether the justification may be given in evidence on the plea of not guilty.

Cases have been cited to shew, that where several persons join in a plea of justification, if the matter pleaded is a good justification of some, but not of all, the plea is bad as to all. These cases are all on demurrer to the plea. Here, there is no demurrer. Whether the constable could have given the warrant in evidence without the judgment, is not now the question; for the plaintiff himself produced the evidence, which completely justified the constable; and it seems to me, that the jury having received that evidence were bound to find for him. But taking the issue as we find it on the record, I think the constable might have given the warrants in evidence without the judgments. The court of Common Pleas have considered the three defendants as having joined in one plea of justification. It does not strike me in that light. The short entry of "not guilty with leave to justify," is not to be compared to a special plea of justification by the three defendants. The only *plea*, or rather memorandum for a plea, on the record, is *not guilty*, which may be very properly applied to the defendants *severally*, and then the *leave to justify* will be *several* also. I am sorry to be

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obliged to remark, that our loose manner of pleading produces great uncertainty. In the present instance, it does not even appear, what matter the defendants meant to offer as their justification. But as the nature of the case distinguished the constable's justification from the others, it is not to be presumed, that he intended to confine himself to their justification. If the plaintiff's attorney will go to trial on this confused kind of issue, he must take the consequence; he had a right to insist on a specification of the matter intended to be offered in evidence. As it stands each defendant had a right to give in evidence, any thing which would amount in law to a justification.

I am of opinion that the court of Common Pleas were wrong in that part of their direction to the jury which related to the constable. The judgment must therefore be reversed, and a *venire facias de novo* awarded.

YEATES J. The plea of *non cul.* with leave to justify, as to all the defendants below, seems warranted by our practice. Our pleadings are drawn up very shortly, and *non cul.* is a several issue as to all the defendants, though distinct matters may be necessary for their justification respectively.

The act of assembly of 21st *March* 1772, 1 *St. Laws* 604, specially provides that if an action shall be brought against a constable, for any thing done in obedience to the warrant of any justice of the peace, or against any other person or persons acting in his aid, jointly with such justice, on producing and proving such warrant at the trial of such action, the jury shall find for such constable and person or persons so acting as aforesaid, notwithstanding any defect of jurisdiction in such justice; and if the verdict shall be found against the justice, the plaintiff shall recover his costs &c.

Our law points out no particular plea for the constable or justice, as is done by the *British* statute of 21 *Jac.* 1. *c.* 12., which directs that they may plead the general issue, and give the special matter in evidence; *Espin. Dig.* 338.; but from the generality of its terms, I have no doubt, that the constable might give the execution in evidence under the general issue of not guilty, and without difficulty under the leave to justify.

To the constable, it is of no moment how the justice has proceeded, provided he has the sanction of the latter for his conduct. It might be objected against the justice, that the issuing of his execution would not shelter him from damages, unless founded upon a judgment in a case wherein he had jurisdiction; but not against the constable.

But all difficulty as to pleading is got over in the present instance. For if even we admit, that as to the justice and the plaintiffs in the suit before him, they could not give the execution in evidence, without shewing the judgment, the plaintiff below himself gave the two executions in evidence as is stated in the bill of exceptions; and being thus produced, he cannot now object that they were improperly received under the plea. They operated as a complete shield to the constable, and the jury were bound to find for him, though the circumstances of the case might have turned out to be such, as to warrant a verdict against the other defendants.

I am of opinion, that the judgment of the court of Common Pleas be reversed, and a *venire facias de novo* awarded.

BRACKENRIDGE J. concurred.

Judgment reversed, and
Venire de novo.

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Philadelphia, Saturday, December 22.

CHERIOT *against* FOUSSAT.

THIS was an action of replevin for 58 hogsheads and 830 bags of coffee, and 23 bales and 3 bags of cotton. The cause was tried before the Chief Justice at a *Nisi Prius* in *March* last, under the plea of *property*, when the jury found a verdict for the plaintiff, 19,296 dollars 27 cents damages; and now upon a motion by the defendant for a new trial, the case from the report of the Chief Justice appeared to be as follows:

The jurisdiction of a foreign court may be examined, not only as to the authority under which it is erected, but as to the subject over which it is exercised; but if the court is duly constituted, and has jurisdiction over the subject, its decrees *in rem* cannot be revised by the court of another nation.

The arrêtés of the *French* consuls and commanders in *St. Domingo*, interdicting trade with the blacks of that island, are not to be considered simply as municipal laws, but as connected with a state of war with revolted subjects; and it is therefore competent to *France* to vindicate those laws, upon the ocean, beyond the limits of her own territory. But supposing them to be purely municipal, there seems to be nothing in the law of nations to prevent any sovereign from punishing the violation of his penal municipal laws, by seizure on the high seas, out of his own territory, and not within the territory of any other sovereign.

The decree of a foreign prize tribunal of general jurisdiction, condemning property for having been concerned in the violation of law, is conclusive upon the point that the seizure of the property was made in conformity with the law, it being a matter within their jurisdiction to decide.

It is not necessary in order to give jurisdiction to a prize court, that the property captured should have been brought within the dominions of the captor. Seizure and safe possession are all that are necessary to give jurisdiction, and whether the possession be within the dominions of the captor, or of a neutral, is immaterial. The possession of the particular captor is the possession of his sovereign every where. And although the property has been sold as perishable goods by the prize agent with whom the papers were deposited by the captor, and taken into the neutral country of the owner before condemnation, still the condemnation is valid, and confirms the original taking.

A court of common law has no jurisdiction of a cause whose object it is to recover property taken and condemned as prize, for having contravened a law of *France* interdicting trade with her revolted subjects in *Saint Domingo*.

The plaintiff, a citizen of the *United States* residing in *New York*, chartered the schooner *Mars*, captain *Hammond*, in *December* 1803, for a voyage from *New York* to *Jeremie* in the island of *Saint Domingo*, and back. On the 5th of *January* 1804, the schooner arrived at *Jeremie*, where she sold her outward cargo, and took on board a quantity of coffee and cotton for the plaintiff's account, with which she sailed for *New York* on the 2d of *February*. On the next day, when the *Mars*, *according to the captain's protest*, was about five leagues distant to the northwest of *Cape Donna Maria*, she was captured by two *French* privateers, who, after taking out the captain, supercargo and crew, and sending them in an *American* vessel to *Jamaica*, put two prizemasters on board the *Mars*, and ordered her to *St. Jago de Cuba*. The supercargo of the *Mars* proceeded from *Jamaica* to *St. Jago*, where he arrived on the 25th of *February*, and found the

Mars lying at anchor completely unloaded, but saw no part of the cargo. He then sailed for *Philadelphia*, where he arrived the 11th of *April*, and about two days after his arrival found a part of the cargo of the *Mars* at an auction store, to which it had been sent by the defendant, and where he finally identified by the marks and numbers, notwithstanding an effort had been made by some person to efface them, 47 hogsheads and 733 bags of the coffee he had shipt on board the *Mars* at *Jeremie*. The plaintiff then instituted this action.

The defendant admitted the 47 hogsheads and 733 bags of coffee to have been part of the cargo of the *Mars*, and claimed it as his own property under the following evidence:

In the same month of *December* 1803, the defendant, a citizen of the *United States* residing in *Philadelphia*, chartered the schooner *Two Brothers* for a voyage to *St. Jago de Cuba* and back, and despatched her to that port in the beginning of *January*, with a cargo of dry goods &c. on his own account. She arrived at *St. Jago in sixteen* days, where she sold her cargo; and the laws of *Spain* there in force, not permitting a foreigner to carry on trade and merchandise or to buy and sell himself, but obliging him to employ a resident merchant, the supercargo employed as his factor one *Don Augustin de la Texera*, in whose name he purchased on the 14th of *February* a return cargo of coffee (the property in question) cotton and segars from two merchants of *St. Jago*, and paid for it with the proceeds of the outward cargo. The supercargo swore that the coffee and cotton &c. were shewn to him in the stores of the merchants where they were purchased, and were brought in canoes from the shore to the schooner which sailed with them for *Philadelphia* about the 20th of *February;* that he did not understand when he purchased them, that they proceeded from an *American* or other prize, nor did he understand or hear any thing tending to create a doubt or suspicion of the title of the persons who sold the same, but made the purchase fairly and *bona fide*, in the usual mercantile manner, and in the regular course of business.

The defendant then gave in evidence the following order of sale, by *John Baptiste Audibert*, together with the certificate of the *American* consul at *St. Jago*, that *Audibert*

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was, by the people of the *French* nation in *St. Jago*, acknowledged as commissary of the *French Republic*, in which capacity he acted in that city.

" 18th *Pluviose*, Year 12. } In the name of the *French* government. Extract from the minutes of the agency of the *French* government for the island of *Cuba*.

" I *Jean Baptiste Audibert*, commissary of marine, and *French* agent for the island of *Cuba*, having the charge of bringing suits *in cases of prize* in this island,—

" Considering the request made to me by the citizen *Pierre Descombre*, prizemaster of the *American* prize called the *Mars*, for authorizing the sale of the merchandise belonging to the said schooner *Mars* of *New York*, commanded by captain *Ansel Hammond*, captured by the two *French* privateers, the *Coquette*, captain *Bouchet*, armed for a cruise in virtue of a commission granted by the captain general of *Guadaloupe*, on the 16th *Frimaire* of the present year, and the *Serpent*, captain *Anderson*, armed in virtue of a letter of marque dated the 17th *Fructidor* year 11, granted by general *Rochambeau*, captain general of *St. Domingo*,—

" Considering that the said request is founded on the damaged state in which the said captured schooner is at present, that she takes in so much water as to make it feared that the goods on board said vessel may be damaged thereby, which I myself have ascertained by going on board said prize, and by the examination made by me in the damaged parts of the said vessel,—

" Considering that while waiting for the definitive judgment which shall be pronounced on said prize by the competent tribunal, it will be for the mutual benefit both of the captors and captured, that a measure for the preservation of their interests should be taken, to prevent the waste in the merchandise of which the cargo of the said schooner *Mars* is composed, and that a prompt sale of those articles, is a matter of material consequence to either party,—

" *In virtue of the powers vested in me by my government, and in conformity with my instructions, which authorize me to permit the sale of the cargoes of vessels captured from the enemies of the Republic, and of those found contravening the*

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laws upon the coasts of Saint Domingo, *without waiting for the definitive sentence,*—

"And in consideration of the urgent motives aforesaid, as well for the interests of the captors as for those of the captured,—

"I authorize the said citizen *Pierre Descombre*, the prize-master having charge of the *American* prize called the *Mars*, to sell for cash to the highest and best bidder, the cargo of the schooner *Mars*, proceeding from *New York*, and captured in consequence of having had communication and traded with the brigands of *St. Domingo*,—

"On condition that the said citizen *Pierre Descombre*, shall deposit the sums arising from the said sale in the hands of the citizen *Dallest* a *French* merchant established in this city, there to remain until the definitive sentence be pronounced, in order that the same may be delivered to the parties whose claim may be substantiated before the tribunals.

"Given at *St. Jago de Cuba*, 18th *Pluviose*, year 12 of the *French Republic*." [6th *February* 1804.] "AUDIBERT."

He also gave in evidence the following decrees, condemning the cargo of the *Mars* as prize to the captors:

"In the name of the government. The provisional commission of justice established at *Santo Domingo*, deciding in the first instance *in cases of prize*, in virtue of the arrêté of the consuls of the republic of the 12th *Vendemiaire* year 11, [4th *October* 1802] on captures of vessels found contravening the laws and regulations concerning *French* commerce, and that of foreigners, with the *French* colony of *St. Domingo*,* has pronounced the following judgment;—

* The following notification was communicated to the *American* government and published in the public papers, by Mr. *Pichon* the *French charge des affaires* on the 18th *March* 1802:

"The undersigned commissary general, and charge des affaires of the *French* republic, gives information to all persons whom it may concern, that in consequence of the revolt of the negroes in *St. Domingo*, all manner of intercourse is by order of the commander in chief for the *French* republic in that island, prohibited to foreigners, with any other part of the island, but the two ports of *Cape Francois* and *Port Republicain*. Cruisers will arrest all foreign vessels attempting to enter any other port, and to

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"Having seen the documents produced in favour of the validity of the prize, in the suit instituted by the citizen *Audibert*, *French* agent at the island of *Cuba*, at the request of the owners of the *French* privateers, the *Coquette*, captain *Bouchet*, and the *Serpent*, captain *Anderson*, that the capture by them made of the *American* schooner *Mars*, captain *Hammond*, should be declared good and legal, which documents are as follows; [Here followed a list of the documents of vessel, cargo &c. &c.]

"Considering that it results from all the papers of the schooner *Mars*, that captain *Ansel Hammond* has communicated with the rebels of *St. Domingo*, and that he has traded with them,—

"Having seen the 4th article of the arrêté of the captain general of the 17th *Vendemiaire*, year 11, [9th *October* 1802] as follows—"*All coasting or other vessels, found communica-*
"*ting with the places on the coast occupied by the rebels, shall*
"*be seized, and the vessel and cargo confiscated,*"—

"Having also seen the first article of the arrêté of the captain general, dated the 10th *Ventose* last, [1st *March* 1804] as follows: "*The port of Santo Domingo is the only one in*
"*the colony of St. Domingo open to French and foreign com-*
"*merce. Consequently every vessel anchored in the bays, creeks*
"*or landings on the coast in the possession of the rebels,—*
"*those going to ports in their possession, or returning from*
"*the same, with or without cargoes,—and generally every*
"*vessel under sail within the territorial extent of the island,*

communicate with the revolted negroes, to carry either ammunition or provisions to them. Such vessels shall be confiscated, and the commanders severely punished, as violating the rights of the *French* republic, and the laws of nations.

"Fair and regular traders will meet with encouragement and protection at the above mentioned places, from the general in chief, and subordinate authorities.

"The intercourse between the *United States* and these two ports is left open to the *American* trade. It will be advisable for merchants who make shipments to the colony, and who wish to meet no interruption by incurring suspicion of improper conduct, to take proper certificates from the commissioners or commercial agents of the *French* republic in the *United States*, who are instructed to deliver them to the applicants.

"Given at *Georgetown, District of Columbia*, the 27th *Ventose*, 10th year of the *French* republic. 18th *March* 1802. *L. A. Pichon.*"

"(except from Cape Rafael to the bay of Ocoa) *which may* "*be found at a distance less than two leagues from the coast,* "*shall be seized by the vessels of the government, and by the* "*privateers bearing our letters of marque, who shall bring* "*them as soon as possible into the port of Santo Domingo, in* "*order that the confiscation of the said vessels and cargoes may* "*be pronounced.*"

"The provisional commission of justice, acknowledging the correctness of the arguments of the commissary of government, declares and adjudges, that the *American* schooner *Mars*, of *New York*, captured by the *French* privateers the *Coquette* and the *Serpent*, with a cargo of cotton and coffee, coming from *Jeremie*, *is a good prize*, and is confiscated for the benefit of the captors. In consequence whereof, that the said schooner, her tackle and apparel and cargo, shall be sold in the usual manner, in order that the product arising from the said sale, may be divided between the captors, a deduction being first made from the whole, of the judicial charges and duties to the republic. Which shall be executed, saving the right of appeal."

"Thus done and adjudged at *Santo Domingo* in the hall of justice, at a public audience on this day the 1st *Thermidor*, 12th year of the republic." [20th *July* 1804] *Rigaud*, *Coca*, *Franco*, *Lavistida*, *Marie*, members. *Lemaire* Secry."

"In the name of the *French* government. Sitting of the 7th *Thermidor* in the 12th year of the *French* republic, (26th *July* 1804) presided by general *Ferrand*, captain general and commander in chief of the island of *St. Domingo*, at which were present the citizens *Dubuisson* &c."—

"The special commission of appeal *in matter of prize*, established by the arrêté of the general in chief, *Ferrand*, captain general, bearing date the 6th *Nivose* last, (28th *December* 1803) conformably to the arrêté of the consuls of the *French* republic of the 12th *Vendemiaire* 11th year* (4th *October* 1802) to decide definitively on the appeals from the judgments given in the first instance by the provisional commission of justice, sitting in the city of *Santo Domingo*, concerning the prizes made by the vessels of the state and the

* For a copy of this arrêté, See 4 *Cranch*. 246.

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French privateers, on neutrals taken and suspected to be acting in contravention of the laws and regulations concerning the *French* and foreign commerce,—

" In the suit appealed from, instituted at the request of the owners, captain, officers, and crews of the *French* privateers *La Coquette*, captain *Bouchet*, and *Le Serpent*, captain *Anderson*, petitioners for the validity of the prize of the one part, against the captain and owners of the *American* schooner *Mars* of *New York*, *Ansel Hammond*, master, captured by the said privateers, absent defendants of the other part,— Present, commissary of the government for the greater regularity of the proceedings in the cause, and for the preservation of the interest of whom it may concern,

" Has given the following decree.

" After having heard the report of citizen *Saint Paul*, judge reporter of the said commission, together with the opinion of citizen *Daubermont*, marine inspector, acting as agent of the government,—

" Having seen the documents of the said suit to the number of 24, together with the judgment given the 1st *Thermidor* instant (20th *July* 1804) by the provisional commission of justice sitting in this city, on the report of the citizen commissary of the government, and the appeal from the same, dated the same day; the whole seen and maturely considered,—

" Considering that it results from all the ship papers of the schooner *Mars*, that the captain *Ansel Hammond* has communicated and traded with the rebels of *St. Domingo*,—

" Having seen the fourth article of the arrêté of the captain general *Le Clerc*, bearing date the 17th *Vendemiaire* 11th year, 9th *October* 1802)—

" The special commission decreeing on the appeal from the judgment given by the provisional commission of justice the 1st *Thermidor* instant, (20th *July* 1804) and acceding thereto, does declare the *American* schooner *Mars*, *to be good and lawful prize*, affirms the judgment given, and dismisses the appeal as unfounded. In consequence it is decreed by the court here, that the same shall be intirely executed, and that all costs of suit, as well in the first instance, as in the appellate cause, shall be deducted out of the proceeds of the sale

of the schooner and cargo in question, *conformably to the marine ordinance of* 1681, and the arrêtés of the council of state of the 8th *March* and 23d *December* 1705.

" Moreover it is decreed that an exemplification of the present judgment shall be addressed to the commissary of the government near the provisional commission of justice, to be by him transmitted to the agent of *St. Domingo* at *St. Jago de Cuba*, who is charged with its execution, and to see that as well the duties due to the government, as the charges and costs arising to the provisional commission of justice, and to the special appellate court, be duly paid.

" Done at *Santo Domingo* in the hall of the government, the day month and year as abovesaid. *Ferrand*, president, *Auger*, secretary."

At the instance of the defendant's counsel, two points were reserved at the trial, by the Chief Justice. 1. Whether the protest of the captain was competent evidence;* 2. Whether

* The objections taken to the protest, were,

1. That it was sworn to before a magistrate, the notary certifying that the magistrate had authority to administer oaths; whereas, the protest should be made before a notary, if there was one in the place. *Boyce* v. *Moore*, 2 *Dall.* 196.
2. That it should be made by the captain and a majority of the crew, whereas this was made by the captain and supercargo only. *Richette* v. *Stewart*, 1 *Dall.* 318.
3. That between these parties it was not evidence, as in practice it had been admitted only between insurers and insured, and in commercial cases; and it was a paper so generally rejected by courts out of this state, so scrupulously watched by the courts within this state when admitted, and so repugnant to the general principles of evidence, that it ought never to be received except in a case for which there was a clear precedent. *Nixon* v. *Long*, 1 *Dall.* 6., *Story* v. *Strettell*, 1 *Dall.* 10., *Richette* v. *Stewart*, 1 *Dall.* 318., *Westcott on Ins.* 432., 1 *Valin* 382., *Brown* v. *Girard*, 1 *Binney* 41., 2 *Marsh.* 616., *Senat* v. *Porter*, 7 *D. and E.* 158.

The answers to these objections were,

1. That the *noting*, which was the substantial part of the protest, was done by the notary at *Kingston*, and it should be presumed that he had not power to administer an oath.
2. That not an instance in this state could be adduced, in which a protest had been rejected because a majority of the crew were not sworn, the opinion in *Richette* v. *Stewart* being merely a dictum; and it was commonly the practice for the captain to do it alone, or with an officer and a seaman or two, without reference to the majority.

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this court had jurisdiction of the case, it being connected with asserted matter of prize.

On the general question, it was contended for the defendant, that the property was devested from the plaintiff, and transferred to him; 1. By the operation of the *Spanish* law upon his *bona fide* purchase at *St. Jago*, without notice of the plaintiff's claim.* 2. By virtue of the decrees of the

3. That a protest had been admitted by President *Biddle* in an action by the shipper of goods against the captain; *Gilchrist* v. *Ward*; and that upon searching the record of *Nixon* v. *Long*, the parent case upon this subject, it appeared that the action was *covenant* by the owners of a vessel against the charterers, to recover freight according to a charter party; the plea, that the vessel returned empty and no freight was due; the replication, that it was by the default of defendants; and the captain's protest, made by himself *alone*, was admitted in evidence.

TILGHMAN C. J. Two objections have been made to the *form* of the protest. 1. That it is not accompanied by a majority of the crew. Although it has been *said* in one of the cases cited from *Dallas*, that this was necessary, yet it has never been decided so, and I think the practice has been to the contrary. Indeed it now appears from the record in *Nixon* v. *Long*, the foundation of the law in *Pennsylvania*, that the captain *alone* protested. 2. The next objection is that the protest was not before the notary; but it appears that the protest was first *noted* before the notary, and then sworn before a magistrate. It was afterwards formally extended by the notary, who certifies that the magistrate had power to administer the oath. The notary, unless authorized by the law of *Jamaica*, could not administer the oath. No proof is given to shew that he had power, and it is probable from the circumstances, that he had not. I think this objection cannot be sustained.

The principal point is whether the protest is evidence. If it were a new point, I should have no hesitation in rejecting it. I consider the admission of it both dangerous and unnecessary. Dangerous, because there is no cross examination; unnecessary, because the captain, if living, might have been examined in the usual form. But I am bound by former decisions; and after what has passed, I should think it unwarrantable in me to reject the evidence. Inasmuch however as the very point now in dispute has not been expressly decided, viz. whether in an action of replevin, the protest is evidence, I shall be happy if the defendant's counsel will move it in bank, and I therefore consider the point as reserved.

* The defendant's counsel having obtained proof of the unwritten law of Spain upon this and other points in the cause, by the testimony of *Louis Moreau Lislet* esquire, an advocate at *New Orleans*, taken under a commission to that city, the reporter hopes that he performs an acceptable service to the professional reader, and at the same time renders a part of the cause more intelligible, by abstracting from the commission the material interrogatories, together with the answers of that gentleman.

courts of *St. Domingo*, and the order of their authorized agent.

The plaintiff in answer to the *first* point denied the *bona fides* altogether; and contended, that if it existed, the *Spanish* law did not give the defendant a right, at the same time deny-

Interrogatory 2. Are you conversant in the laws of the kingdom of *Spain* and the colonies thereof? Have you studied and practised, and do you still practise or expound the said laws, in the regular exercise of your profession or office? Is a knowledge of the said laws necessary in order to a due exercise of the legal profession in the territory of *Orleans*, and why?

Answer. That he is an advocate practising in the several courts of the territory of *Orleans*, and that he believes that he has acquired some knowledge of the laws of the kingdom and colonies of *Spain*. That it is his duty to give opinions and argue causes depending on the said laws, the knowledge of which is indispensable to those who exercise the profession of an advocate in the courts of this country; because the acts of congress, establishing the provisional government of this territory, have continued the laws which existed here at the time of the cession of the country to the *United States*, in which very little alteration has been hitherto made by the territorial legislature.

Interrogatory 3. Is there in the code or system of *Spanish* laws, any law or established doctrine analogous to the *English* common law doctrine of *market overt?* If yea, state what that doctrine is, as clearly, fully and perspicuously as you can. State particularly what are the requisites necessary to constitute a sale in *market overt*, or in the *Spanish* analogous mode; what are the objects or species of property which may be sold in that manner, and what are the effects of such sale. State also how far by the law of *Spain*, the purchaser of movable goods, coming under the description of merchandise, say for instance coffee, sugar and the like, is bound to inquire into the title of his seller, particularly if such seller be a regularly established merchant?

Answer. That the principles of the *Spanish* law concerning sales made in a public fair or market (*market overt*) are not absolutely the same with those of the common law of *England*, as far as this deponent is acquainted with them, except with regard to that species of movable property, more particularly known under the name of *merchandise*. That movable property in general cannot be acquired by a sale from a person not being the lawful owner thereof, by virtue of the mere *bona fides* of the purchaser, unless he has had possession so long as to bar the owner by means of the statute of limitations. (See the *law of Partidas. Partida* 3, *title* 29, *Law* 9.) But it appears that for the facility of commerce, an exception has been introduced in favour of sales of *merchandise;* and this deponent verily believes, on the strength of the authorities herein after cited, that a legitimate title, such as a sale or exchange of *mere merchandise* coupled with good faith in the purchaser, is a bar to all claims of the person who should prove himself the lawful owner thereof, saving the recourse of such owner against the one who should have improperly sold his goods. (*Curia Philipica, Book* 1, *Chap.* 7. *No.* 19.) For in the case cited in that work, the

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ing that the *Spanish* law was the rule; and 2dly, that the capture having been made more than two leagues from the coast of *St. Domingo*, for the breach of a municipal regulation, the sale not having been ordered by a court of compe-

question turns upon a claim of merchandise marked with the owner's mark, which would seem to support a claim for restitution much more than if the goods were not marked, and of course were more difficult to be identified. And this deponent further declares, that according to the practice and usage of commerce in *Spain* and *New Orleans*, he is informed and believes that he who purchases merchandise, is not bound to inquire whether the seller has or has not a title to, or a right to dispose of, the same, particularly if he purchases them in a fair or market, or of a merchant whose business is to sell similar articles.

Interrogatory 4. What are by the *Spanish* law the effects of the sentence of an incompetent court? Is such sentence considered *ipso facto* as a mere nullity, not only between the parties to it, but also as it respects third persons, who *bona fide* purchase property, or otherwise act under it, being ignorant of the defect of jurisdiction? For instance, if a court of justice, regularly established, but mistaking its jurisdictional powers, should in a case in which it was not competent to act, have ordered the sale of goods belonging to an individual, and such property had been sold under the authority of that court in the regular course of its general proceedings, and *bona fide* purchased by a person ignorant of the defects of its jurisdiction, what would be in such case the legal consequence? Does the *Spanish* law make it incumbent on the purchaser to inquire at his peril into the jurisdiction of a court in the particular case? Is the sale considered as a nullity, and can the original owner recover the goods sold, in a suit brought against the purchaser, with or without refunding the money that he paid therefor? Or is the sale considered valid on account of the *bona fides* of the purchaser or otherwise, and the original owner left to his remedy against the party who obtained the judgment of the incompetent court, and procured the goods to be sold by virtue thereof?

Answer. In answer to this fourth interrogatory the deponent will merely say, that by the *Spanish* law, a third person who purchases property moveable or immovable at a sale made by judicial authority, is not liable to a suit by him to whom the property belonged at the time of sale, provided the solemnities or formalities required by law for similar sales, have been exactly complied with. (*Curia Philipica*, 2*d part*, § 22, *No.* 27. *Of Executory Judgment.*) That this authority seems to exempt the purchaser of goods sold by judicial authority, from the obligation to inquire into the validity of the judgment by which the sale was ordered, or the competency of the judge who made the decree. That the only duty which the law imposes upon him, is to inquire whether the formalities which have been established for the regularity of judicial sales have been complied with; and now those formalities, by the *Spanish* law, are merely those which are prescribed in the 3d and 6th Laws, Title 27, of the 3*d Partida*, and in

tent authority, and the *res* not being within the dominions of the captor at the time of the condemnation, and never having been within them, the capture, sale and decrees did not devest the plaintiff's property.

Curia Philipica, Part 2d, § 22, No. 4. That by the *Spanish* law, the incompetency of the judge is a radical nullity, which vitiates the judgment, and it may be quashed, even without the necessity of an appeal. But the party who will take advantage of that nullity, must not have pleaded to the merits, and must have pleaded in abatement, before *litis contestatio*, otherwise he is considered as having acknowledged the competency of the judge, and to have consented to submit to his decision. See *Partida* 3. *Title* 3. *Law* 9.—*Wood's Institutes, book* 4. *c.* 8. *No.* 3. *p.* 324.—Unless the party should prove that he has acted by mistake, in submitting to the incompetent judge.

Interrogatory 5. Suppose a parcel of goods should have been unjustly taken by an individual from another, under some legal color, say of distress for rent or the like; suppose the unjust seizor should sue the owner of those goods, before a court of regularly established jurisdiction, but from some circumstance of locality in the place where the goods were taken, incompetent to decide on the particular case. Suppose that court, either from corruption, ignorance or mistake, should decree the goods to have been legally taken, adjudge them to the seizor, and order them to be sold for his benefit. Suppose the said goods should be sold under that order and purchased by *A* for a valuable consideration. Would the decree of the court be a title to *A*, the purchaser, against the original owner, or would he be obliged to restore them on a suit instituted by the latter against him?—6. What if a third person, ignorant of the circumstances of the case, should *bona fide* purchase the goods in question at second hand, from the one who had purchased them when sold under the order of the incompetent court. Would, by the law of *Spain*, such third person be bound to inquire at his peril into the title of the seller, and into the jurisdiction of the court under whose authority such seller purchased? And would under these circumstances such secondhand purchaser be liable to restore the goods or the value thereof to the original owner, in a suit brought against him by the latter?—7. If such seller at second hand were a merchant, and the said goods were bought of him in his store in the regular course of trade, what would the law be in such case?

Answer. This deponent believes that he has already answered the 5th, 6th, and 7th interrogatories.

Interrogatory 8. Can you extract from *Spanish* law books of authority in your power or possession, any texts of positive law, or passages from approved authors, confirming, explaining, or elucidating the doctrines by you laid down in your answers to the above interrogatories? If yea, please to extract the same, and annex such extracts upon your oath or affirma-

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The Chief Justice charged the jury in substance as follows: The plaintiff having proved his property, it lies on the defendant to shew in what manner it has been devested, and transferred to himself. This he has undertaken to do

tion to your said answers. If, however, you refer to the *digests*, or other parts of the *corpus juris civilis*, you need not annex the extracts at large, but only refer to the work itself, by its known divisions of book, title, law and paragraph.

Answer. That the following authorities may be cited in support of the above answers of this deponent, and that they are exactly extracted or translated from *Spanish* writers, whose opinions prevail in the *Spanish* courts, or from the collection of laws published under the name of *Partidas* by king *Alphonso* the Sage, and which (with the compilation of *Castile*) form the most ancient and most respected code, which exists in *Spain* and its colonies.

Latin translation of the *9th Law, Title* 29. *Partida* 3. *by Gregorio Lopez.*

How movable goods are acquired by prescription.

Movables are prescribed for by three successive years of *bona fide* possession, the possessor believing that the one from whom he purchased had the power of alienating, and a just title is required. These things concurring, he has acquired a property in the goods, unless the owner will prove that they have been stolen or taken by force.

Translation of *Curia Philipica.*

No. 18. If merchandises or other things are marked with the mark of some person, and that person claims them of a third in whose possession they are, the third person cannot be obliged to restore them to the plaintiff, unless he shall make his right fully appear; such is the opinion of *Straccha*, with whom agrees *Matienzo* 19. And even if the plaintiff proves that the merchandises and other things are marked with his mark, and that he has marked them himself, the third person who is in possession thereof must be maintained therein, if he proves the title by virtue of which he has obtained and possesses the same, as by a sale, exchange, or the like, by reason of the good faith which induces a presumption of the title.

Another passage of the *Curia Philipica*, 2*d part*, § 22. *No.* 27.

Third purchasers of effects judicially sold.

The person to whom a thing is sold by a public and judicial sale is free from all claim on the part of the debtor, when the sale has been made with all legal solemnities, and so say *Salgado, Gutierrez*, &c.

Latin translation of the *Partidas, by Gregorio Lopez; Title* 27*th Partida.* 3*d.*

How execution is to be made.

Law 3. When judgment is given for a debt, it must be first executed on personal chattels, and afterwards, if those are not sufficient, on clear and manifest credits. No execution is levied on horses, arms, or on the pay of military men, nor on oxen, except there be not other property sufficient to satisfy the debt; and if a third person makes opposition to the execution, affirming that the goods are his, or that he has a right to them, the judge must decide summarily thereon. If however judgment be given on a thing certain, execution shall be made thereon.

in two ways. 1. By virtue of a *bona fide* purchase without notice of the plaintiff's claim. 2. By virtue of the orders and decrees of the *French* court of Admiralty, and its agents.

Law 5. A final judgment for a debt is to be executed within ten days; and if it is given on a thing certain, execution must be made immediately; and if the defendant shall say without malice that the thing is eloigned, he must give security to deliver it within a certain time, or to pay the value thereof, &c. When a judgment for a debt is to be executed.

Law 6. If on a judgment the judge has given the defendant's property in pledge to the plaintiff, he may, if the debt is not paid, expose it to public sale for twenty days, after the expiration of which time, it is to be delivered to the highest bidder, and the residue is to be paid over to the debtor; but if no purchaser can be found, the judge may deliver the pledge to the creditor by way of sale at a fair valuation. How goods levied upon must be sold or given in pledge.

Translation of *Curia Philipica*, 2d *part*, § 22. *No.* 4.

A judicial sale must be made at the accustomed place, and in the usual form, and if possible at the place where the thing is situate, so that it may be seen, and its quality and situation ascertained, because otherwise it would not be sufficient to make the sale at the place where the judgment is given, as is said in *Law* 33. *Title* 26. *part* 2., and the commentary thereon. *Glose* 6, and in *Avendano*.

Interrogatory 9. Are the principles and doctrines which you have laid down, conformable to the established law in the colonies of *Spain* as well as in the mother country?

Answer. The laws and principles above stated are applicable to the *Spanish* colonies as well as to *Spain* proper.

Interrogatory 10. Do you know any thing else which can throw light on the points of *Spanish* law in controversy between the parties to the above action? If yea, please to state the same fully and at large, as if you were thereto specially interrogated.

Answer. That the deponent knows nothing more that may have any relation to this cause, except that the *Roman* law, is the common law of *Spain*, in all cases which are not provided for by positive or special laws. This deponent must however add the following laws, which he has omitted to quote with the preceding ones.

Latin translation of the *Partidas* by *Gregorio Lopez*, *Title* 22, *Partida* 3.

Law 15. A sentence rendered by an incompetent judge is not valid, even if the parties, believing him to be competent, voluntarily, but through error, litigated before him. Nullity of incompetent judgments.

Title 3, *Partida* 3.

Law 9. Dilatory exceptions, as of an agreement not to demand the money within a certain time, or pleas to the jurisdiction, must be pleaded by the defendant before *contestatio litis*, afterwards, he is not to be heard. When the plea to the jurisdiction is lost.

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1. The title by purchase is founded on the *Spanish* law, of which the defendant has offered evidence. To this the plaintiff objects, in the first place, that the matter is not to be decided by the *Spanish* law, but by the law of the *United States*, of which both plaintiff and defendant are citizens; and he says further that the defendant has not proved the *Spanish* law to be as he alleges. It seems to me that the case must be governed by the *Spanish* law, because the contract for the purchase of the coffee was made within the dominions of *Spain*. It is a general principle that contracts are to be construed according to the law of the country where they are made; and this principle is founded on reason and convenience. It would produce great confusion, if the owner of personal property, fairly acquired according to the laws of the country in which it was situated, should, on its being removed into another country, be devested of it, because he had not acquired it according to the law of the country into which it was removed. It has indeed been decided, that if a contract is made in one country, with a view to *violate* the laws of another, the courts of justice of the country intended to be injured, will afford no relief for the purpose of carrying such contract into effect. A contract, for instance, made in *France* for the sale of goods, with the express purpose of smuggling them into *England*, would receive no countenance from the courts of justice in *England*. This is an exception to the general rule, founded on strong motives of policy. But there is no analogy between that case and the one before us. There is no law or policy of the *United States* or the state of *Pennsylvania*, which is violated, by one of our citizens going to the *West Indies*, and there purchasing goods which have been condemned as prize, and importing them into this country. It is our interest, that property acquired by our citizens in the fair course of trade *abroad*, should be enjoyed without molestation *at home*. No authority has been cited by the plaintiff to warrant this objection, and I am of opinion that it cannot be sustained. We come to the question then, what is the law of *Spain*? On the present occasion, we can only know that law by the evidence which has been produced. The defendant has brought forward the evidence of Mr. *Moreau de Lislet*, who is now a judge of

the parish of *Orleans*, in the territory of *New Orleans*. The plaintiff has remarked, that it is singular the defendant should have rested this matter on the testimony of one man. But it may be remarked in answer, that it is more singular still, that the plaintiff should have produced no testimony at all on this subject. There has been time enough to produce counter evidence, and as this has not been done, and the character of Mr. *Moreau* stands unimpeached either with regard to integrity or legal knowledge, we must suppose that he has spoken the truth. It is his opinion, and he gives the authority on which he founds it, that by the law of *Spain*, a good title to *merchandise* may be acquired, by a purchase made fairly and openly, in the usual course of business, from a person who usually deals in the kind of merchandise thus purchased. If this be the law of *Spain*, it is contrary to our own law, to the law of *France*, of *England* (except the city of *London*, and sales made at fairs and in open market) and to the *Roman* or civil law, which prevails in most countries of *Europe*. Supposing it however to be the law, it is essential to this kind of title, that the purchase be made with perfect good faith, without the least mixture of fraud, collusion, or artifice. To apply it to the point in question. If the agent of the defendant had any knowledge that the coffee had been captured, or if without having certain knowledge he had heard reports on the subject, sufficient to put a prudent man on his guard, he acted at his peril in making the purchase, and must abide by the consequence. But if, without *knowing*, or having reasonable cause to *suspect* the manner in which it had been brought to *St. Jago de Cuba*, he purchased it in the open and usual course of trade, out of the store of a person who was accustomed to deal in that article, I am of opinion that according to the evidence which has been given, the defendant acquired a good title, and the verdict should be in his favour.

2. If the jury should be against the defendant on this point, his second ground of defence is to be considered; the proceedings in the court of Admiralty. The jury will in the first place consider, whether they are satisfied from the evidence, that the capture was made at the distance of more than two leagues from the island of *Hispaniola*. If they are

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not so satisfied, the decree of the *French* court of Admiralty is supported by the opinion of the Supreme Court of the *United States* in the case of *Hudson* v. *Guestier*, 4 *Cranch.* 293, with which I concur; and the verdict should in that case be for the defendant. The fact, as to distance, depends on the protest of the captain. I submit it to the jury without any remark. It is for them to decide. If they are of opinion, that the capture was at the distance of more than two leagues from the coast of *Hispaniola*, the case is precisely the same as that of *Rose* v. *Himely* decided by the Supreme Court of the *United States*. The opinion of that court was, that the *French* court of Admiralty had no jurisdiction, and consequently no title could be acquired under their orders or decrees. In this decision are involved very important questions, concerning some of which, notwithstanding the great weight of the authority, I cannot say that my mind is fully satisfied. I think it most prudent however to advise the jury, to take the law as laid down in the case of *Rose* v. *Himely*. At the same time, I desire it to be understood, that I take for granted this case will be brought before the court in bank, and that I reserve to myself the liberty of forming my final opinion on more full deliberation than a trial at *Nisi Prius* admits. On this last point then, if the jury should be of opinion, that the capture was at the distance of more than two leagues from the shore, I request them to find for the plaintiff.

The motion for a new trial, together with the reserved points, were argued at last *March* term by *Duponceau* and *Lewis* for the defendant, and by *Condy* and *Rawle* for the plaintiff.

For the defendant, it was contended, 1. That the protest was not evidence in this suit. 2. That this court had no jurisdiction of the cause. 3. That by the law of *Spain*, a *bona fide* purchase of merchandise vests the title, and hence the verdict of the jury was against law. 4. That the verdict was also against law, because the defendant had a valid title under the capture, sale, and condemnation.

1. The first point was argued upon the same ground which was taken at the trial, and has been already noticed. (*a*)

(*a*) See note * supra 227.

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2. Upon the second, the argument was in substance this: A court of common law is not competent to try matter of prize, spoliation on the high seas, piracy, or the validity of a foreign sentence of admiralty; nor can it entertain jurisdiction of a case, in which one of these points must be decided. The reason is an obvious one. Cases of this sort always involve the responsibility of governments. They are to be settled according to the law of nations; and they therefore should be tried only in a court proceeding according to that law, and intrusted by its own sovereign with the adjudication of those causes, which uniformly concern the sovereign authority of another nation, and may intimately affect the public relations of the country. Accordingly at an early period, and while the common law courts were very tenacious of their power, it was held by them, that the Admiralty alone could try the question of piracy. *Case of the Admiralty.* (*a*) Upon the same principle a prohibition was refused to stay a suit in the Admiralty against the vendee of goods piratically taken at sea; *Anon. Cro. Eliz.* 685; and the reason given for it in *Pelagi's case*, (*b*) where a like application was refused, was, that if granted, there would be no remedy for the owner, who could not proceed in a court of common law. Whether piracy or not, may depend upon the validity of the commission under which the capture is made; and whether valid or not, is a question which a municipal court is not competent to decide, so as to affect the question of property growing out of it. In like manner a prohibition to the Admiralty was denied, solely on account of the question of prize, notwithstanding the plaintiff in prohibition shewed, that the captor and the ship taken, both belonged to *England*, and of course the taking was a mere trespass. *Tompson* v. *Smith.* (*c*) It is of no consequence that the matter attempted to be tried in the common law court, is not the direct question of prize between the captor and captured. If it is a controversy between other parties depending upon the question of prize, or involving the validity of a sentence of Admiralty, *Radley* v. *Egglesfield;* (*d*) if the principal matter is a taking at sea, though at the same

(*a*) 13 *Co.* 52.
(*b*) 3 *Bulstr.* 29.
(*c*) 1 *Sid.* 320.
(*d*) 2 *Saund.* 259.

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time, the immediate foundation of the rights of one party is a transaction on land; *The King* v. *Broom*, (*a*) *Tompson* v. *Smith*; if the injury done, or the claim set up, is one of the consequences or incidents of a taking as prize, *Le Caux* v. *Eden* (*b*), *Doane's Adm'rs* v. *Penhallow* (*c*), *Ross et al.* v. *Rittenhouse* (*d*), *Smart* v. *Wolfe* (*e*), the question is exclusively triable in the Admiralty, according to the law of nations, and not in a court which proceeds according to the rules of the common law. Indeed so far has this jurisdiction of the Admiralty been respected, that in *Vanderwoodst* v. *Thompson* cited by *Buller* J. in *Le Caux* v. *Eden*, it was held that an action would not lie in the common law court for a trespass in entering the plaintiff's ship on the high seas and taking his goods, because there was reason to suppose, as was said by *Gould* justice, that the ship was a pirate. It is essential that questions of this description should be subjected to the decision of some forum, governed by the same rules in all countries; and it is worthy of remark, that in the celebrated answer to the *Prussian* memorial, *Great Britain* justified the reprisals she had issued against *Spain* on account of captures at sea, partly upon the ground that those captures were judged of in revenue courts, and not in courts of Admiralty according to the law of nations. 1 *Magens* 506. In the present case the taking was as prize. The court at *St. Domingo*, upon the face of the decree, proceeded as a prize-court, though it also had instance jurisdiction. The court of appeal is styled "the special commission of appeal *in mat-*"*ters of prize;*" and the schooner *Mars* and cargo were condemned *as prize*, and ordered to be distributed according to the ordinance of 1681, which has a title on prizes of war, and no other. It is impossible to hold plea of this suit without examining the proceedings of a court claiming to be a prize-court, or without directly deciding the question of prize or no prize, against all the authorities cited. Judge *Washington*, in *Snell* v. *Foussat*, was of opinion that the District Court alone had jurisdiction; but owing to a compromise, the point was not finally decided in the Supreme Court. Indeed in none of the analogous cases, which originated on the common law side of the Circuit Court, and were after-

(*a*) 12 *Mod.* 134. (*c*) 1 *Dall.* 218. (*e*) 3 *D.* and *E.* 323.
(*b*) *Doug.* 573. (*d*) 2 *Dall.* 160.

wards carried to the Supreme Court, was the point so made as to obtain a decision.(*)

3. The law of *Spain* was the rule of the contract made by the defendant's supercargo with the possessors of the coffee at *St. Jago*. It is not merely upon the question of construction that this law may be cited, but also upon the

(*) SNELL v. FOUSSAT. } By the notes of judge *Washington*, with a copy of which the reporter has been favoured, the case was thus:

"It was *Trover* for a quantity of coffee. The case stated by the plaintiff, was, that the *Charlotte*, being his property, took in at *Cape Francois* in 1803, a quantity of coffee for the plaintiff, and some for other shippers; and while on her return to *New York*, was captured by a *British* frigate, part of her hands taken out, a prizemaster put on board, and ordered for *Jamaica*. After being in possession of the *British* prizemaster for some days, she was captured by a *French* privateer, and carried into *St. Jago de Cuba*. Having lain there for a short time, her cargo, or a part of it, was transshipped into a vessel called the *Messenger*, brought to *Philadelphia*, and came to the possession of the defendant, who on demand by the plaintiff refused to deliver it up, saying it had been purchased at *Cuba* for him by his supercargo."

"The defence was *first*, that the evidence adduced by the plaintiff, did not shew his property in the coffee delivered to the defendant; that the marks of the barrels and bags, as entered at the *Customhouse* here, did not correspond with those put on them at *St. Domingo*, and therefore that if the coffee taken in by the schooner *Messenger* at *Cuba* was proved to have come from the *Charlotte*, yet it might as well be the coffee of the other shippers as of the plaintiff, and if so, a recovery in this action would be no bar to an action by those persons.

Second. That by an arrêté of *General de Noailles*, general of brigade, commander in chief of the right northern division of the army of *St. Domingo*, dated the 6th of *November* 1803, a council of prizes was established for *Cape St. Nicholas Mole*, who on the 30th *November* 1803, in consequence of a report made by their officer on the 29th, that the *Charlotte* was cleared from the Cape for *New York*, and was captured and recaptured as before, that he is positive she was first detained and afterwards condemned by the captain of the *British* frigate, that it is evident she was a prize to the *English*, and was found with an *English* prizemaster on board, and concluding by stating as the result of all this that she and her cargo ought to be considered as *English* property, and ought to be condemned, did condemn the vessel and cargo as good prize taken from the *British*, and ordered her to be sold for the benefit of the captors. The vessel lay at *St. Jago* at the time of the condemnation, the transshipment into the *Messenger* took place on the 5th of *November*, and she was entered at *Philadelphia* on the 5th of *December*."

"The counsel contended, on these facts, that the condemnation was conclusive as to the property; that the vessel being in a *Spanish* port was no objection; that *prima facie*, this court must presume the court to be an

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question of validity. If the contract is valid by the law of the country where it is made, it is so in all countries, unless it is made with intent to violate the law of another country, in which case the courts of that country will not aid it. *Robinson* v. *Bland.* (*a*) And although the contract may be void

authorized tribunal; and that it was no objection to the condemnation, that the cargo was previously sold. Cases cited on this point: 3 *Rob. Rep.* 269., *Bynk. b.* 1. *ch.* 15., *Vat. p.* 515. *b.* 3. *s.* 132., 1 *vol. Corp. de Pr. s.* 370., *Mart.* 45., *Lampredi, p.* 183., 2 *Ruth.* 594., 4 *Rob.* 57., 3 *T. Rep.* 192.

"*Third.* If all this was against the defendant, yet he was a bonâ fide purchaser, and according to the correct opinions of civilians, the plaintiff, if he recovered, ought to pay the amount of what the coffee cost, or what it was reasonable to think the plaintiff would have given for the release of the property. That fraud, according to the understanding of civilians, consisted in combination and secrecy, benefit to ourselves, and injury to others. On these points: 2 *Kaimes c.* 9. 391. 390., 2 *Cochin* 708., *Grot.* 1 *vol.* 395., *Paff.* 451., 1 *Ruth.* 135. *Case of the Neptune before the Dist. Ct. of Pennsa.*

"On the other side were cited: 2 *Vat.* 272., *Martens* 105., *Peak's Ev.* 47, 48., 1 *Rob. Rep.* 119. 135., 2 *Rob.* 2. 9., 4 *Rob.* 35., 3 *Rob.* 192. 53. 83.

"The defendant moved to nonsuit the plaintiff, upon the ground that this being a cause dependent on the question of prize or no prize, it belonged exclusively to the district court. *Cases cited:* 3 *T. Rep.* 341., *Cro. El.* 685., 13 *Co. Rep.* 52., 3 *Bulstrode* 27., 1 *Sid.* 320., 2 *Lev.* 25., 2 *Saund.* 359., 12 *Mod.* 134., *Carth.* 423. 474., *Dougl.* 572., 3 *T. Rep.* 333., 3 *Dall. Glass and Gibbs.*, 2 *Dal.* 165., 1 *Dal.* 218., *Mart.* 100., *Dougl.* 592., 2 *Brown A. L.* 213., 2 *Rob. Rep.* 198., 3 *Rob. Rep.* 82.

"On the other side were cited: *Comb.* 120., *Carth.* 31., 3 *Keb.* 297, 360, 364., 1 *Lev.* 243., 12 *Mod.* 16, 143., 1 *Hen. Black. app.* 51, 52., *The Span. Treaty* 6. *art.*, 2 *vol. U. S. Laws* 516., 1 *Dal.* 95., 2 *Dal.* 4., 3 *Dal.* 333., 2 *Wood. Sec.* 451. 454., 2 *Burr.* 685. 1209., 10 *Mod.* 510., 4 *Rob.* 232. 240., 2 *Dal.* 81.

"Upon the motion for a nonsuit the court was divided. Judge *Peters* thought we had jurisdiction, I was of a different opinion. No reasons were given. But those which governed me were shortly as follows: The *Charlotte* was captured by the *English* frigate as prize, was recaptured by the *French* privateer as prize, sent into *Cuba* and afterwards condemned. The plaintiff at the time of the capture had an indisputable title to the property in question, if it is identified. But if it was lawfully seized and condemned, the right of the plaintiff was devested. The very question in issue, therefore is, whether the property in dispute was captured as prize, and lawfully condemned so as by the law of nations to change the property. The question, therefore, of prize or no prize, is the very gist of this action; and all the cases from the earliest period prove that such a question as well as the consequences of it, belong exclusively to the court of prize, and in this country to the District Court."

WASHINGTON, Justice, charged the jury.

"This is an action of trover and conversion, the ground of which is property in the plaintiff in the goods claimed, and a conversion by the de-

(*a*). 1 *W. Black.* 256.

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by the law of the country where sued, it does not exempt the party who impugns it, from the necessity of shewing as a fact that it is void in the country where made. *Male* v. *Roberts*. (*a*) The *lex loci* applies emphatically to contracts of sale. As it is said by the court in *Grant* v. *M'Lachlin* (*b*), "a sale according to the law of the place where the "property is, must vest a title in the purchaser, which all "foreign courts are bound, not only from comity, but on

fendant. The evidence to establish the right of the plaintiff to the goods brought in the *Messenger* and delivered to the defendant, is very contradictory. It is essential to the plaintiff's recovery, that he should satisfy you upon this point. It appears that other coffee than that belonging to the plaintiff was shipped from the *Cape*. That the marks upon the packages of the plaintiff's coffee were different from those which appeared on the packages entered at the customhouse at *Philadelphia*. It therefore becomes highly important that you should carefully examine the evidence, and unless you are satisfied that the plaintiff has established his right of property in the very coffee delivered to the defendant, your verdict must be for the defendant. But if you should be of opinion that the plaintiff has proved his right to that identical coffee delivered to the defendant, then we are of opinion that the condemnation at the *Mole* did not affect it. A condemnation of neutral property, by an unauthorized tribunal, is not to be regarded by the courts of other nations. It is contended that *prima facie*, the council of prizes at the *Mole* is to be considered as a legitimate court. I admit that where we find a condemnation by a foreign court, of the origin of which we are not informed, we ought to presume it a legitimate tribunal. But when the source of its authority and constitution is stated, we ought to examine it, and if it be contrary to the usual mode of constituting courts, it shifts the burthen of proof upon the party who would support the condemnation, particularly as it is more easy to prove the legitimacy of the court, than to disprove it. We know that the appointment of courts is in all civilized countries, by the sovereign power. This power may be lodged by the sovereign in a subordinate civil officer; nay in a military commander, if the sovereign so choose. But this latter mode is so unusual, that when we hear of a court being constituted by a military commander, and particularly where it is not clear that he was at the time commander in chief, it destroys the presumption of its legality, so as to require the party who would support the condemnation, to shew that the court was instituted by lawful authority."

"The court being agreed upon this point, we think it unnecessary to decide the other objections to this sentence."

The jury found for the plaintiff.

(*a*) 3 *Esp.* 163. (*b*) 4 *Johnson* 40.

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"strong grounds of public utility, to recognise. Without "this rule, there could be no safety in derivative titles." Sir *Wm. Scott*, in the case of the *Helena*, (*a*) carries this principle to the extent of protecting the *bona fide* purchaser of an *English* ship captured by an *Algerine* corsair, and sold by the Dey without any judicial proceeding whatever. He presumed the sale was made regularly *in their way*. The testimony of Judge *Moreau*, and the citation from the *Curia Philipica*, shew that a *bona fide* purchase of merchandise from a person who deals in the article, vests a title by the law of *Spain;* and the evidence of the defendant's supercargo establishes the good faith, and the fact of purchase from merchants in the regular way of business. The jury have made rash presumptions of the supercargo's knowledge, from his being at *St. Jago* when the *Mars* arrived, from the population of that city, and from its being a place of rendezvous for *French* prizes. They have found against evidence as well as law.

4. The defendant has a title under the capture, sale, and condemnation, which cannot be defeated, if the court of *Santo Domingo* had jurisdiction; for where the proceeding is in *rem*, it never has been questioned that all the world are bound as to the property in the *res*, provided the court has authority to decide upon the case. What then are the objections to the jurisdiction? 1. That the *Mars* and her cargo were never within the dominions of *France*. It is not necessary that they should have been, by the law and practice of nations; of *France* since the year 1665, of *England* since the time of king *William*. As early as 9 *W.* 3., a vessel captured and carried into a river on the coast of *Africa*, was condemned in the Admiralty of *England*, and effect was given to the condemnation by the Kings Bench. *The King* v. *Broom*. (*b*) In 1745 the *English* Vice-Admiralty at *Gibraltar* held plea of a prize taken by an *English* privateer, and carried into *Lisbon*, a neutral port, where she then lay. *Pond* v. *King*. (*c*) Sir *William Scott*, while advocate-general, argued in the case of *Smart* v. *Wolfe*, (*d*) that by the capture

(*a*) 4 *Rob.* 4.
(*b*) 12 *Mod.* 134.
(*c*) 1 *Wils.* 191.
(*d*) 3 *D. & E.* 329.

the thing was acquired to the state, and though put into the hands of the captors, remained in contemplation of law in the custody of the public; and that the Admiralty had therefore jurisdiction of the subject, wherever the thing might be in the possession of the captors or their agents. In confirmation of the doctrine he mentioned several cases, in which the Admiralty exercised this jurisdiction, although the thing was either sold, or situated in a neutral country, particularly the case of the *Buoen Consago*, an *English* prize taken into *Lisbon*, and condemned in *England*. In the case of *The Herstelder*, (*a*) however, he for the first time expressed dissatisfaction at the practice, and said he would not condemn a vessel lying in a neutral port; and in the *Flad Oyen*, (*b*) though he admitted there had been some cases of condemnations in *England* of *British* prizes carried into *Lisbon* and *Leghorn*, he said the infrequency shewed the irregularity of them, and he endeavoured to justify these cases by treaties, which had given to *Lisbon* and *Leghorn* the character of *British* ports. But finally he was compelled to return to his first opinion; for in *The Henrick and Maria*, (*c*) where the point was directly in question, and was fully investigated, he referred to a vast number of cases in which the practice had been followed, and although he argued against it, said it was too inveterate for him to shake. His judgment was affirmed in the court of appeals, (*d*) where it was shewn to have been the practice in the war of 1756; it was followed in the case of *La Dame Cecile* (*e*) in 1806; it has the complete sanction of most if not all the nations in *Europe;* and has been recognised by the highest judicature of our own country in the case of *Hudson* v. *Guestier*. (*f*) The sale before condemnation does not alter the case; since the vendor was the authorized agent of prizes, and the vendee was his representative until condemnation, which confirmed all the preceding acts. 2. Another objection is, that the seizure was made, according to the captain's protest, more than two leagues from shore, which is supposed to have been the jurisdictional limit of seizure, according to the arrêté of

(*a*) 1 *Rob.* 100. (*c*) 4 *Rob.* 35. (*e*) 6 *Rob.* 257.
(*b*) 1 *Rob.* 119. (*d*) 6 *Rob.* 138. (*f*) 4 *Cranch*, 293.

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the 1st *March* 1804. This however is a plain misconstruction of the arrêté; for the circumstance of being within two leagues of the coast, is the offence, and not a limitation of the place of seizure. After it is committed, it may be punished by seizure any where upon the high seas, the common jurisdiction of nations. The offence alleged against the *Mars*, was her communication with the brigands, not that she had been found within a certain distance of the coast. But supposing the place of seizure to be material, the sentence is conclusive upon the point, that the seizure was duly made. Every thing constituting the validity of a prize, is within the cognisance of a prize-court; and therefore to say that the prize is not valid because the seizure was not made in the right place, is to open a door for the revision of the sentence in all its parts. The lawfulness of the capture as to locality, is as much within the jurisdiction of a prize-court, as its lawfulness for any other cause. It is a point which has been directly decided by the court at *Santo Domingo*. But in reply to this it is said, that the law was a municipal law only, and that for breaches of municipal law there can be no seizure *extra territorium;* of course, that this fact is connected with the question of jurisdiction. It cannot be called a municipal law, solely, because it was made in execution of a belligerent right, and the aggressors against it were threatened with punishment for violating the laws of nations. If however it was, what shall prevent a nation from punishing the violation of her municipal laws, by a seizure on the ocean? She invades the territory of no other nation; but on the contrary is on that highway which is common to all, and where she is therefore as free to act as upon that which is separately her own. Accordingly all nations authorize seizures beyond the marine league, in vindication of municipal laws. *Great Britain* by her hovering acts directs them at a distance of more than four leagues, if the offender has been within four. 24 *G.* 3. *c.* 47., 10 and 11 *W.* 3. *c.* 10. The *United States* authorize their revenue-cutters to board vessels any where within four leagues of the coast. 1 *U. S. Laws* 236. *Great Britain* took all vessels coming to this country during the revolutionary war; and the *United States* seize on the high seas all vessels of their own citizens vio-

lating the laws of non-intercourse. It is the law and practice of nations, and is not to be disturbed. The case of *Rose* v. *Himely* (*a*) is not an authority for the position that the place of seizure is material. A majority of the five judges who ruled that case, went upon the ground that the property had never been taken within the dominions of the captor; and this opinion being overruled in the case of *Hudson* v. *Guestier*, (*b*) which was argued at the same time, that cause was remanded to the Circuit Court, where it was again tried, and the jury instructed that the distance from the shore at which the seizure was made was wholly immaterial; and a bill of exceptions having been taken to this opinion, it was carried to the Supreme Court, where the judgment was affirmed at the last term. So that *Rose* v. *Himely* has been overruled throughout.

For the plaintiff, the argument upon the competency of the protest was the same as at *Nisi Prius*.

2. Upon the second point, the jurisdiction of this court, it was argued that unless the jurisdiction was sustained, the plaintiff was without remedy. The question of prize or no prize is not triable in the Admiralty, more than in a court of common law. It is triable only in the prize-court, which acts by special commission, is the court of an actual belligerent to try the validity of its own captures, and exists only in time of war. *Lindo* v. *Rodney*. (*c*) As to the subject matter, courts of admiralty and of common law have a coextensive jurisdiction. A prize-court differs from both as to the subject, and draws to itself the exclusive consideration of captures in right of war. But the *United States* have no such court. The District Court has jurisdiction as a court of Admiralty, but not as a court of prize; and if we can try the present question only in a court of prize, there is no forum for the trial of the case in this country. This however cannot be. It would expose our citizens to the grossest wrongs. As a neutral we never can have a prize-court to try the validity of *British* or *French* captures. We never can require

(*a*) 4 *Cranch*. 241. (*b*) 4 *Cranch*. 293. (*c*) *Dougl*. 591. *note*.

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it, because we capture nothing, and there cannot be made any captures of our property, *jure belli*. Every question of property in our country between our own citizens, must be triable in our courts of Admiralty, or in those of common law; and the utmost extent to which the cases of the defendant go, is, that where the cause arises at sea, the Admiralty has a concurrent jurisdiction, and will not be prohibited. This is not a question of prize. Prize is a taking by right of war in a state of war. *Bass* v. *Tingey*. (*a*) The very term implies it. Whether the right be well founded or not, the prize must at last be taken by an *asserted* right of war. But here there is nothing of that kind. There was no war between *France* and the *United States;* there could be none between *France* and her revolted subjects. The taking was by an asserted right of commercial regulation, of which a common law court is perfectly competent to judge. It is not sufficient to oust this court of its jurisdiction, to allege a taking as prize. The possession of the captor may amount to a mere trespass, although the original taking has been as prize; for by delay to procure a condemnation, the captor may prove that the suggestion of prize is a pretence. It must be shewn to have been a taking *jure belli*, and prosecuted as such.

3. It was left to the jury upon the third point, to say whether there was good faith in the defendant; and their verdict has found that there was not, which puts an end to the question of law. They were intitled to infer this from the evidence. But if there was good faith, it is not conceded that the law of *Spain* gives a title to the purchaser of merchandise, by reason of mere *bona fides*. The civil or *Roman* law is stated to be the law of *Spain*. By that law the buyer becomes the master of the article, only in case the seller is the right owner of it. 1 *Domat*. 61. *Nemo plus juris in alium transferre potest, quam ipse habet*. 1 *Pothier Contr. de Vente* 8. It does not acknowledge any thing like market overt; and the only authority for an exception in favour of merchandise, the *Curia Philipica*, goes no further than to say, that goods are presumed to belong to a person whose marks they bear.

(*a*) 4 *Dall.* 44.

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but that this is not conclusive; and that there is a presumption of title in favour of a person who has bought *bona fide*, but which of course may be rebutted. This however is not a case of contract in which the *lex loci* prevails. That applies only between the contracting parties, by virtue of their consent. But the plaintiff never consented to the *Spanish* law. He was plundered by force; and if that force was unlawful, no title could grow out of it.

4. The proceedings and condemnation have not devested the plaintiff's property, because the *French* court wanted jurisdiction for the following reasons: 1. The court acted on its instance side for the breach of a municipal law, and its jurisdiction therefore depended upon a seizure within the reach of the municipal authority; but the seizure was on the high seas. 2. The proceedings and the sentence were *ex parte*, fraudulent, and void, the thing taken never having been within the dominions of the captor, but having been at the time of condemnation within the country of the captured. 1. It is plain from all the arrêtés, and also from the notification of Mr. *Pichon*, that *France* conceived herself to be in the exercise of a territorial right, when she interdicted commerce with the blacks of *St. Domingo*. She uniformly speaks of them as revolted subjects, never as enemies. She punishes those who prosecute the trade she inhibits, by confiscating their property, not by seizing it as prize of war. She had no right in her belligerent character to interdict trade with *St. Domingo*, except to blockaded places, and in contraband of war. She had an unquestionable right as the sovereign of the island, to punish the least intercourse with any part of it. It is therefore in opposition to the obvious intent of *France*, if the proceeding in question is treated in any other character than a seizure under a municipal law, and a condemnation in a municipal court, to punish the violation of territorial rights. It follows that the jurisdiction of the court was of a municipal character, which depended wholly upon the seizure's being such as a municipal law will warrant, that is, a seizure within the territory of the sovereign; and it having been made where the law had no authority, where the sovereign had no territorial rights, it was illegal, and could not

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give jurisdiction. There can be no doubt upon the principles of public law, that the statutes of a country have no extraterritorial force. 2 *Kaime's Prin. Eq.* 352, 354. Her penal statutes are peculiarly local, and affect nothing which cannot be seized within their influence. *Folliot* v. *Ogden*. (*a*) Courts to whom the vindication of those laws is confided, have a jurisdiction only coextensive with the law; and hence every act of jurisdiction beyond the territory is absolutely null. 1 *Erskine's Inst. book* 1. *tit.* ii. 23. *Kaime's Hist. Law Tracts* 232. *France* herself claimed a jurisdiction only within the two leagues, and those who claim under her cannot assert a more extensive one. If the jurisdiction on the high seas is common to all nations, it is against the right of any nation at peace to seize her subjects there. The instant the territorial limit is passed, territorial offences are left behind, and the offender comes under the protection of his own country; he becomes, as it were, a part of it, and it is against the equality of nations to molest him. The jurisdiction thus depending upon the place of seizure, that fact must be examined. If it does not appear, it may be, and according to the decision of the Supreme Court, (*b*) it *must* be shewn by evidence; and if shewn that the seizure was beyond the territory, as it was here, it amounts only to a marine trespass, and confers no jurisdiction. *Rose* v. *Himely*. (*c*) 2. But the court also wanted jurisdiction, because the property was never carried into the dominions of *France*, and the proceedings were wholly *ex parte*, and in fraud of the plaintiff. However the practice may have been in *England*, certainly nothing of that sort can deter us from adopting the true principle in relation to the jurisdiction of prize courts. There has been no practice in this country; nor has there been any binding decision upon the point. The case of *Hudson* v. *Guestier* was ruled only by five judges, and in *Rose* v. *Himely*, Judges *Cushing*, *Chase*, and *Livingston* were of the opposite opinion. It was the absence of Judge *Cushing* in *Hudson* v. *Guestier*, that gave a majority upon the question, when in fact the court was equally divided; and this court may therefore pursue their own judgments without restraint. No one can read the argument of

(*a*) 1 *H. Black.* 123. (*b*) 4 *Cranch.* 298. (*c*) 4 *Cranch.* 272.

counsel and court in the case of the *Henrick & Maria*, without seeing, that the practice is repugnant to all the laws of war, and in fact to all the principles upon which prize jurisdiction is founded. It converts a neutral country into a belligerent station, contrary to the laws of neutrality; and would, during the present contest, disgrace *America* by making her a *French* warehouse. Although the proceeding is *in rem*, the *res*, which alone gives jurisdiction, is never within the power of the court. The court cannot restore it, if there shall be an acquittal, and it cannot by its own process inforce condemnation. The owner and his agents who are intitled to be either parties or witnesses, are carried away; so that in relation to them, the fiction of their presence in the Admiralty is a solemn farce. And in fine, the practical principle of prize jurisdiction, the actual hostile possession by force, is exchanged for a mere constructive, ideal, representative possession, by a captor, or his agent, or neutral vendee, so that with as much safety to both belligerents and neutrals, a condemnation might pass, where there was in fact no capture at all. It was the view of these consequences that induced the Supreme Court of *New York* in *Wheelwright* v. *Depeyster*, (*a*) to decide, in direct opposition to the defendant's rule, that a prize-court cannot adjudicate on a prize lying in a foreign port, or out of the jurisdiction of the captor or his ally; it also led to the strong doubt expressed by this court in *Duncanson* v. *Maclure*. (*b*) There is no safety to neutral property, under the principle contended by the defendant. In the present case it was used as an instrument in the perpetration of a gross fraud. A sentence was not thought of until the replevin by the plaintiff. It was then fabricated to cover a defective title, without notice to any one on behalf of the owner, and therefore in open violation of the first principles of natural justice. Fraud vitiates every thing, even the sentence of a court having jurisdiction; and in this case fraud is the basis upon which the jurisdiction is claimed, and upon which alone it can be supported.

Cur. adv. vult.

(*a*) 1 *Johns.* 470. (*b*) 4 *Dall.* 314.

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The Judges now delivered their opinions.

TILGHMAN C. J. This is an action of replevin for a quantity of coffee, and cotton, which having been shipped from *Jeremie*, a port in the island of *St. Domingo*, in possession of the revolted negroes, was captured by two *French* privateers, and carried to *St. Jago de Cuba*, in the island of *Cuba*. It was there purchased by the defendant, and brought to *Philadelphia*, where being discovered by the plaintiff the original owner, this suit was brought. The defendant supports his claim to the property, under a decree of condemnation by the court of the *French* republic at *Santo Domingo*, and an order of sale, by *John Baptist Audibert*, styling himself "commissary of marine, *French* agent in the island of *Cuba*, "authorized to make the preparatory proceedings in mat- "ters of prize in this island."

On the trial of this cause, the plaintiff's counsel contended, that the *French* court had no jurisdiction, and therefore its proceedings were void; and they relied on the case of *Rose* v. *Himely*, 4 *Cranch*. 241, in the Supreme Court of the *United States*, as directly in point. My respect for that court, forbade me to dissent hastily from its decision, in a case, confessed by all to be important and difficult. I therefore requested the jury to find for the plaintiff. But at the same time I declared, that the case of *Rose* v. *Himely* involved questions, concerning some of which, notwithstanding the great weight of the authority, my mind was by no means satisfied; and I desired it to be understood, that I expected this cause would be brought before the court in bank, where I might have an opportunity of forming a final opinion, after full argument.

If the *French* court decided on a subject within its jurisdiction, the plaintiff cannot recover, for we have no right to inquire into the correctness of that decision. How then does this matter of jurisdiction stand? But a previous question is made. Has this court a right to inquire into the jurisdiction of the court of another nation? The general principle is, that what has been decided by a court of competent jurisdiction in one nation, shall not be questioned in the court of another. This would seem to leave the question of compe-

tency open. And there is strong reason why that question should be open; for otherwise we should be subject to the greatest abuse. A person might style himself a judge, without any authority from the government under which he professes to act. A case of this kind has actually happened, and was brought before the Circuit Court of the *United States* for the *Pennsylvania* district. The late Mr. *Noailles*, on his passage from *St. Domingo* to the island of *Cuba*, undertook to erect a prize-court. One of the decrees of that court was brought into question in the case of *Snell* v. *Foussat*. The jurisdiction was inquired into, and found to be without authority from the *French* government. The Circuit Court therefore declared the decree to be void. But even where the authority of the court has clearly emanated from the sovereign power of the nation, it is going too far to say, that its jurisdiction cannot be questioned. All nations are on an equality. If any one then, should undertake to erect a jurisdiction in manifest violation of justice, general convenience and long established principles, is this to be submitted to? Suppose a belligerent should direct his officers to hold prize-court, within the dominions of a neutral, without that neutral's consent, can it be doubted, whether the jurisdiction of such a court may be called into question? But it is answered that it is the business of *government*, and not of *courts* of *justice* to seek redress in case of these irregular acts of sovereigns. This answer does not appear satisfactory. Government may certainly interfere with great propriety. But what are the courts to do, when the subject is brought before them in the course of the administration of justice? They cannot refuse to decide, and have no rule to govern their decisions but the law of nations. We know very well that the *English* courts make such inquiries, and have decided, that decrees under the authority of a belligerent, within the dominions of a neutral, are of no validity. I have frequently known the jurisdiction of *foreign* courts inquired into in this court, and particularly in the case of *Duncanson* v. *Maclure*, where the ship *Mount Vernon* was condemned by a *French* court in *St. Domingo*, while she was lying in the *Spanish* island of *Porto Rico*. That case was very much contested, but I think our right to inquire into the jurisdiction of the *French*

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court was not denied. So also in the cases of *Rose* v. *Himely*, and *Hudson* v. *Guestier* in the Supreme Court of the *United States*, the jurisdiction of the foreign court was inquired into. I conclude therefore that we may inquire into the jurisdiction.

The clearest manner of inquiring into the jurisdiction of the *French* court, will be, to consider the objections that have been made to it. These objections may be reduced to the following heads.

1. The arrêté under which the court proceeded, was a penal municipal law.

2. A municipal law cannot be inforced *extra territorium.*

3. The seizure was without the territorial limits of the *French* republic.

4. The property condemned was never brought within the *French* territory.

1. The nature of the arrêté is to be collected from its words, and from the circumstances of the island of *St. Domingo*, before and at the time of making it.

For a considerable time before the making of this arrêté, there was war between the *French* republic, and the negroes of *St. Domingo;* and the *French* were driven out of possession of the principal part of the island. The revolted negroes were considered by the *French* government as rebels, and it had been officially notified by their minister in the *United States*, that all persons carrying on trade or maintaining an intercourse with the inhabitants of *St. Domingo*, contrary to the ordinances of the *French* government, should be punished as violaters of the *rights of the French republic*, *and the law of nations.* The government of the *United States* has taken no part between the contending parties. It has never acknowledged the independence of the revolters. We are not at liberty therefore to consider the island in any other light, than as part of the dominions of the *French* republic. But supposing it to be so, the republic is possessed of *belligerent* rights, which may be exercised against *neutral* nations, who carry on commerce with the revolters. This is not denied; but it is said that the words of the arrêté prove, that there was no intention to exercise such rights. This argument is not conclusive.

Although the *French* government from motives of policy, might not choose to make mention of war, yet it does not follow, that it might not avail itself of all rights to which by the law of nations it was intitled in the existing circumstances, under the form of a law made for the regulation of the trade and commerce of one of its colonies. This was the course pursued by *Great Britain* in the revolutionary war with the *United States*, and it has not been supposed that she violated the law of nations, when she captured and confiscated the vessels of neutrals, who carried on trade with the *United States*, in whatever part of the ocean they were found by her ships of war and cruisers.

The *French* court of Admiralty founded its decree of condemnation on the fourth article of the arrêté of 9th *October* 1802, and the first article of the arrêté of 1st *March* 1804. By the former it is declared, that "every coasting or "other vessel, communicating with the points of the coast "occupied by the rebels, shall be seized, and the vessel and "cargo shall be confiscated." The latter is intitled, "An "arrêté relative to vessels taken in contravention of the dis-"positions of the laws and regulations concerning *French* "and foreign commerce in the colony;" and is in the following words. [Here the Chief Justice read the arrêté.] Considering the words of this last arrêté, and the circumstances under which it was made, it ought not to be understood simply as a municipal regulation, but a municipal regulation connected with a state of war with revolted subjects; and in inforcing it, the republic might avail itself of all rights, which are given by the law of nations to a government thus circumstanced.

2. If this view of the subject be correct, the second objection falls to the ground, for it is founded on the supposition that the law is purely municipal. When it is said that this law cannot be inforced, *extra territorium*, I presume it is meant, that it cannot be inforced on the ocean, at a greater distance than two leagues from the *French* coast. The reason assigned is, that the ocean is common to all nations. If it was not common to all, but the right of one, the reason would be conclusive. But if it is common, why may not any nation make a seizure on it, for a breach of a municipal

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law? Whose right is invaded by such seizure? The *United States* have authorized the capture of their own citizens on the ocean, for the breach of their municipal laws. The *United States* would not pretend to pursue their own citizens, within the territory of any other power. It seems then, that the ocean being common to all nations, no one has a right to complain, if it is used for the purpose of capture for breach of any law. Yet as this is a point of very great importance, although I have expressed the present inclination of my mind, I will not give a decided opinion on it. I think it unnecessary, because I am satisfied that the arrêté under consideration, ought not to be taken as a law purely municipal.

3. The third objection is founded on the words of the arrêté of the 1st *March* 1804. It is supposed, that the seizure is restricted to the distance of two leagues from the coast of *St. Domingo*. But I am not satisfied of the correctness of that construction. The description of vessels "*cleared* "*from, or bound to*, the ports in the possession of the rebels," seems to be independent of, and not included in the subsequent general description of "all vessels under sail in the "territorial extent of the island, found at a distance of less "than two leagues of the coast." It appears that Chief Justice *Marshall* was furnished with an imperfect translation of the arrêté, when he delivered his opinion in *Rose* v. *Himely;* perhaps his opinion of its construction would have been different, had the translation been correct. But even if the seizure was restricted to the distance of two leagues from the coast, how would the jurisdiction of the *French* court be affected by it? It is not a court instituted only for the trial of captures within two leagues of the coast, but a court of general jurisdiction, styled "the provisional com- "mission of justice established at *Santo Domingo*, judging "in the first instance, in matters of prize, by virtue of the "arrêté of the consuls of the republic of the 4th *October* "1802, on the capture of vessels found acting in contraven- "tion of the laws and regulations concerning the *French* "and foreign commerce in the *French* colony of *St. Do-* "*mingo*." When a vessel is libelled in this court, a breach of some law is set forth, to bring the case within its jurisdiction. If the claimant pleads that the capture was without

the limits prescribed by the law, is the court to lose its jurisdiction? If so, what course is the matter to take? Is restitution to be made to the claimant without trial? Or how, or where is the cause to be tried? It should seem, that the court has the right of deciding those matters, which are alleged against its jurisdiction; and the party, who is dissatisfied with the judgment, has no remedy but by appeal to a Supreme Court of the same nation. If the fact of seizure, within a certain distance of the coast, be material, under the true construction of the law in question, who can say, whether that fact was not considered, and decided by the *French* court?

On the other hand, if that court, appearing by its style, to possess general jurisdiction in case of captures for contravention of the laws respecting commerce, has decided that the distance from the coast is not material, I know not by what principle we can inquire into the correctness of their construction of their own law. I mentioned before, that the case of *Rose* v. *Himely* was urged by the plaintiff's counsel on the trial of this cause. But it now appears, that the authority of the Supreme Court of the *United States*, on which the plaintiff relied, is to be thrown into the opposite scale. In *Rose* v. *Himely*, five judges of the Supreme Court were for reversing the judgment of the Circuit Court of *South Carolina*, by which the *French* decree was held to be conclusive. But the five judges, though they agreed that the *French* court had no jurisdiction, differed widely in their reasons. The Chief Justice and Judge *Washington* founded their opinions on the circumstance of the seizure being more than two leagues from the *French* coast. Judges *Cushing*, *Chase*, and *Livingston*, assigned as the sole reason of their opinion, that the vessel and cargo were condemned by a *French* tribunal, sitting at *Santo Domingo*, without having been carried into that or any other *French* port, and while lying in the port of *Charleston* (*South Carolina*), whither they had been carried by and with the consent of the captor. It was afterwards decided in *Hudson* v. *Guestier*, that the *French* court had jurisdiction in a case circumstanced like that described by Judges *Cushing*, *Chase*, and *Livingston*. The principle on which these three judges relied being thus over-

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ruled, the case of *Hudson* v. *Guestier* came again before the court, when a majority of the judges were of opinion, that the *French* court had jurisdiction without regard to the distance from the coast, and that it made no difference, whether the capture was in the exercise of a belligerent or a municipal right.

4. It remains to be considered whether the *French* court had jurisdiction in a case, where the thing captured had never been brought within the limits of the republic.

This question has of late years been much discussed, applied to vessels captured as prize of war. It must depend on the custom of nations; for without such custom, it does not seem essential that there should be any judicial proceeding, the property being vested in the captors by the act of capture. In cases of capture by armies on *land*, the plunder is divided among the conquerers, without process of law. Fortunately for the world, it has been thought proper to proceed differently with *marine captures*. Courts are established in all civilized nations, who proceed or profess to proceed according to the laws and usages of nations. The courts of the captor exclusively take cognisance of prizes. It is the business of those courts to inquire, whether captures have been regularly made under the authority of the nation in which they are established, and where a neutral is concerned, to ascertain whether he has done any thing which may justly subject his property to confiscation. They are to make the necessary inquiry, and give a decree of condemnation or acquittal with all possible despatch. Seizure and safe possession are all that has been deemed necessary to give jurisdiction; but whether the possession was within the dominion of the captor, or of a neutral, has not been thought material. Sir *William Scott*, who presides with great ability in the *English* court of Admiralty, seemed once disposed to think that jurisdiction could not be assumed, unless the thing captured was within the dominions of the captor; but on full research and reflection, he abandoned that principle, being satisfied that the custom of his own nation as well as of *France*, and the other principal nations of *Europe*, justified the condemnation of a prize, lying in the dominions of a neutral power. This will appear from the case of the *Hen-*

rique and *Maria*, 26th *November* 1799. 4 *Rob.* 35. The *United States* have always considered themselves bound by the law of nations; and in return they expect that in their intercourse with the nations of *Europe*, all will observe the same law. The principle that I have mentioned with regard to jurisdiction, has been recognised by the Supreme Court of the *United States* in the case of *Hudson* v. *Guestier*, 4 *Cranch.* 293., as applied not only to prizes of *war*, but seizures for breach of *municipal law*. Indeed there seems to be no ground for distinction between these two cases. The nation which makes a penal municipal law, has a right to direct the proceedings under it, in what manner it pleases, provided it does not violate the law of nations. The property, as in case of prize of war, is vested by the seizure, and continues as long as the possession. Nor has the neutral power, into whose dominions the thing captured happens to be brought, any right to devest the possession in one case more than the other. It can make no difference, that in the case now under consideration, the property was brought to the *United States* before the proceedings were instituted in the *French* court of Admiralty. Because, before the property was removed from *St. Jago de Cuba*, the papers were deposited with the public *French* agent there, and an order of sale had been made by him, because the coffee was in danger of being spoiled by the bad state of the vessel. That there should be authority to sell perishable goods, seems necessary, though like other necessary powers, it is subject to much abuse, and I am afraid has in fact been greatly abused.

Having thus considered the objections to the jurisdiction of the *French* court of Admiralty, I am led to the conclusion, that *it had jurisdiction* of the cause which it decided, and consequently that its decree vested the property in question in the captors, under whom the defendant derives his title. I am therefore of opinion that there should be a new trial. On the other reasons offered by the defendant for a new trial, I give no opinion.

YEATES J. The first question which has been raised in

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this case, is, whether the protest of captain *Anselm Hammond* should have been admitted in evidence upon the trial?

1. This point has been solemnly determined in this court in *Brown* v. *Girard*, 1 *Binn.* 40., in *December* term 1802, when the arguments on both sides underwent full consideration. Though the *English* adjudications, 7 *T. R.* 158., differ from our decision, yet such has been the uniformity of judicial opinions and practice in *Pennsylvania* for at least forty-eight years past, that I feel myself bound to acquiesce therein, whatever might be my individual sentiments on the subject, considered as a new point. At the same time, I do not hesitate to declare, that it becomes the duty of jurors, cautiously and scrupulously to weigh the credibility of such testimony, and contrast it with the peculiar circumstances of each particular case.

2. Have the transactions in the island of *Cuba*, or the proceedings in *St. Domingo*, changed the property of this coffee?

On full consideration it does not appear to me, that the mere purchase of the coffee at *St. Jago*, effected an alteration of the property by the operation of the laws of *Spain*. The unbending maxim of the common law is, *nemo potest plus juris ad alium transferre, quam ipse habet; Co. Litt.* 309. *b*; and it accords with the plainest dictates of common sense. The same rule holds in the civil law. *Traditio nihil amplius transferre debet, vel potest, ad eum qui accepit, quam est apud eum qui tradit. L.* 20 *ff de acquis. Rer. Dom.* The doctrine holds throughout all the civilized countries of *Europe*, where the civil law is adopted, as far as I can collect from the books. 1 *Domat's Civ. Law. lib.* 1, *tit.* 2, *sect.* 2, 11.; *Poth. Traitè du Contrat de Vente, part* 1. *n.* 7.; *Ersk. Institut. of Law of Scotld. vol.* 2. 485.; 1 *Johns.* 479. In all the different stages of the much contested case of *Rose* v. *Himely*, all the judges of the Supreme Court of the *United States* concurred in opinion, that as far as between neutrals, at least a sentence of condemnation is indispensably necessary to produce a complete devestiture of property. 4 *Cra.* 280, 281-2. 514.

The validity of the condemnation of the coffee at *St. Jago*, must therefore form the great object of inquiry on this ques-

tion; and I will not deny that my mind was forcibly struck during the argument, by the remarks of the plaintiff's counsel.

The schooner *Mars*, after her capture by the two *French* privateers, was carried into the *Spanish* port of *St. Jago*, where she arrived on the 7th *February* 1804. On the next day, *John Baptiste Audibert*, the *French* prize agent, ordered her cargo to be sold. Two *Spanish* merchants became the purchasers of the coffee now in dispute, and the defendant, by his supercargo *John Ribaut*, bought it from them at second hand. It arrived here in the schooner *Two Brothers*, in *March* 1804; and while in this port, and after the present suit had commenced, the condemnation took place on the 21st *July* following, having a retrospective operation on the merits of the cause.

It was insisted, that while the possession remained, the *res* might be either restored or sold, and the sentence of the court be executed; and therefore the possession was the essential fact, on which the jurisdiction of the court depended. But if the *res* be out of the power of the sovereign, he cannot act upon it, nor delegate authority to act upon it, to his courts. 4 *Cra.* 294. The whole world are, or may become parties to a suit in the court of Admiralty, either by claim, or appeal; but relief can only be obtained by application to the tribunals of justice of the country of the captors. The neutral owners cannot enjoy this benefit, however unsubstantial, if their property when arrested may be carried into one port, and proceedings to a condemnation be had in another port, however remote therefrom, of which they can have no knowledge. *Possession* must therefore be essential to the jurisdiction of a prize-court. It is the duty of a prize-court to give a prompt and fair hearing to all parties, and to restore instantly, if upon a summary examination there does not appear sufficient ground to proceed. But how, say they, can this hearing be had, and this restoration made and enforced, when the subject matter in controversy, and perhaps the captors and captured are in a foreign country? The admission of a practice so incompatible with the very constitution of a prize-court would lead to the greatest confusion. Suppose a foreign prize-court should sustain a libel against a vessel lying within one of our

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own harbours, and should proceed to try, condemn and sell the same, would any person hesitate to say, that such a jurisdiction was inadmissible, that such a proceeding was *coram non judice?* To sustain jurisdiction in such a case, would be the height of injustice and absurdity. 1 *Johns.* 483.

More calm reflection has led my mind into a different train of thinking, and effaced my first impressions. I no longer view the defendant's doctrine as a degradation of our national character. It is not pretended that if by any means whatever a prize-court should be induced to condemn as prize of war, a vessel which was never *captured*, that this condemnation would operate a change of property; and it is admitted, that recapture, escape, or a voluntary discharge of the captured vessel, would deprive the court of jurisdiction. 4 *Cra.* 269. 294.

The decisions of this court agree with those of the Supreme Court of the union, that the sentence of a foreign court of competent jurisdiction directly upon the point, is conclusive evidence of the fact which it professes to decide, between the same parties, upon the same matter coming incidentally in question in another court for a different purpose. This doctrine most frequently occurs in cases between insurers and insured, where there is no express stipulation to the contrary in the policies. The respect required to be shewn to the decrees of foreign tribunals, has for its foundation that universal independence and equality of all governments, from which it results, as *Vattel* observes, "that to undertake to examine the justice of a definitive "sentence, is an attack on the jurisdiction of him who passed "it." 4 *Cra.* 511. The doctrine rests upon three very obvious considerations; the propriety of leaving the cognisance of prize questions exclusively to courts of prize jurisdiction;—the very great inconvenience amounting nearly to an impossibility of fully investigating such cases in a court of common law;—and the impropriety of revising the decisions of the maritime courts of other nations, whose jurisdiction is coordinate throughout the world. 4 *Cra.* 435. Mere locality will not of itself, deprive the prize-court of one nation of its jurisdiction, nor give jurisdiction to an-

other. The taking of prize is the foundation of admiralty jurisdiction. A prize brought into our ports by a belligerent, continues subject to the jurisdiction of the capturing power, although the *corpus* be within the limits of another jurisdiction; and it is now the general practice of the *European* nations to condemn in their own courts captured vessels carried into the ports of an ally, or even of a neutral. 4 *Cra.* 513. This practice must be submitted to, until changed by the common consent of nations; and the condemnation will bind the property. The neutral sovereign cannot wrest from the possession of the captor, a prize of war brought into his ports. 4 *Cra.* 295. The particular mode of introducing the subject into the court, or in other words, of instituting the particular process which is preliminary to the sentence, is properly of municipal regulation, uncontrolled by the law of nations, and therefore is not examinable by a foreign tribunal. 4 *Cra.* 297. Our citizens if injured, cannot be redressed in our courts, for the errors or injustice of foreign adjudications. In such cases, they must look to their government for protection and compensation. The possession of the captor is in principle, the possession of his sovereign; he is commissioned to seize in the name of the sovereign, and is as much an officer appointed for that purpose, as one who in the body of a county serves a civil process. He is under the control and direction of the sovereign, and must be considered as ready to obey his commands legally communicated through his courts. 4 *Cra.* 296. I will conclude my remarks on the present question, with the expressions of Mr. Justice *Johnson* in 4 *Cra.* 285. "The de-"cisions of foreign prize-courts do not derive their effect "from their abstract justice; they are in this respect analo-"gous to the acts of sovereignty. They are universally con-"clusive, because no where subject to revision. Among "nations they are considered as intitled to the same validity, "as the decisions of municipal courts, within their respec-"tive territories, and preclude the rights of parties, although "contrary to every idea of law, reason and evidence."

Much reliance was placed during the argument of this case, on the reversal of the judgment of the Circuit Court of *South Carolina*, in *Rose* v. *Himely*, by the Supreme Court.

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The opinion of the court was delivered by *Marshall* Chief Justice, in which Mr. Justice *Washington* concurred, that the prohibition by *France*, by the arrêté of 1st *March* 1804, of all trade with the revolted blacks of *St. Domingo*, was an exercise of a municipal, and not of a belligerent right; and that seizures beyond the limits of the territorial jurisdiction of two leagues from the coasts of that island, for breaches of the municipal regulation, were not warranted by the law of nations, and could not give jurisdiction to the courts of the offended country. This opinion, together with that of Mr. Justice *Johnson*, who dissented therefrom, is reported in 4 *Cranch* 268. 281. *Cushing*, *Chase* and *Livingston* Justices assented to the judgment, without expressing an opinion on the validity of a seizure on the high seas under a municipal regulation, upon the ground, that the vessel and her cargo were condemned by a *French tribunal* sitting at *St. Domingo*, without having been carried into that or any other *French* port, and while lying in the port of *Charleston*, *South Carolina*, whither they had been carried by and with the consent of the captor. The case of *Hudson et al.* v. *Guestier* was decided at the same time, and the judgment therein having been reversed, was sent back to the Circuit Court of *Maryland*, under a mandate for further proceedings. It now appears that a new trial was had in that suit, wherein the court directed the jury, that it was wholly immaterial at what distance from the coast of *St. Domingo* the vessel was taken, the property being by the capture and sale devested out of the plaintiffs, and who therefore were not intitled to recover. The plaintiffs' counsel took a bill of exceptions to this opinion; and a verdict and judgment passed for the defendant, upon which a writ of error was brought. The judgment of the Circuit Court was affirmed in *February* term 1810, by the opinions of *Johnson*, *Livingston* and *Tod*, so that the principle of the decision in *Rose* v. *Himely* is now overruled. I trust that I stand on safe ground, when I assent to the opinion of a majority of the judges of the Supreme Court of the *United States* on a much controverted point; and am therefore of opinion, that the proceedings in *St. Domingo* devested the property of the coffee out of the plaintiff.

3. It may be deemed unnecessary for me to express any opinion, whether this court have jurisdiction over the present subject? This point was reserved on the trial. I shall content myself with observing, that I see no reason for receding from the unanimous opinion of the members of this court, upon this point, in *Ross's Executors* v. *Rittenhouse*. The authorities upon which our judgments were formed, are detailed in the report of that case, 2 *Dall.* 164., which I will not now repeat. If the plaintiff could have sustained his suit on its merits, I think his proper remedy was in the District Court, and not in a court of common law.

Upon the whole, I am of opinion that a new trial should be awarded.

BRACKENRIDGE J. By article 3, sec. 2, of the constitution of the *United States*, it is provided, that "the judicial "power shall extend to all cases of admiralty and maritime "jurisdiction." This might be construed as giving to the courts of the *United States* exclusive jurisdiction of all admiralty and maritime cases; but the judiciary law of the *United States*, 1 *U. S. Laws* 54., has not construed it so extensively; for by sect. 9 of that law, there is a saving to "suitors in all cases, of the right of a common law remedy, "where the common law is competent to give it." A suitor therefore has a right to demand of the court of any state, the remedy of a wrong, where the common law is competent to give it. It follows, that it is demandable of this court, that we give a remedy in this case of alleged wrong, if we are competent to give it.

Our competency will depend upon the question, are we excluded from the "jurisdiction?" Cases of admiralty and maritime jurisdiction, in the meaning of the constitution, must have a reference to cases of that nature as they were understood before the framing of the constitution; and that understanding must have a reference to the admiralty and maritime jurisdiction of the courts of *England*, whence we have drawn our laws. In the courts of *England*, the boundaries are clearly settled, both as to where the jurisdiction is concurrent, and where it is exclusive. The cases of prohibition shew where the admiralty and maritime courts may

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have a concurrent jurisdiction: where they take exclusively may also be seen from the *English* cases. That of *Le Caux and Eden*, *Doug.* 572., may lay a foundation of this examination in tracing the cases.

The admiralty and maritime jurisdiction of the *United States* must therefore be the same with that of the *English* courts, as to what they shall possess exclusively of the common law courts of the individual states; and what the courts of the *United States* cannot exclusively take, we must concurrently possess. It is clearly settled by the *English* cases, that it is not the place, *supra altum mare* or high seas, but the *nature of the question*, that must determine. Of what nature then must the question be that will exclude? The answer to this may be anticipated from the reason of the thing, even were not the decisions of the courts very clear upon this head. The purport of these is, that it must be a question which will involve a claim of some foreign power originally or derivatively; that is, immediately from the foreign power, or derivatively, by some claiming under it. For it must be a question, on the determination of which the preserving peace with some foreign power may depend. Every case of capture *as prize of war*, *must be of this nature.* A case of seizure and condemnation for the violation of a prohibitory law, with relation to the subjects of a foreign power, is within the same reason, and must be of the same nature. For the sovereign has a right to prohibit an intercourse with all, or any part of his dominions. The subject of a foreign power violating such a prohibition, subjects himself by the law of nations to the forfeiture of the prohibition. If a forfeiture of the property be the commination, that property may be seized. But the subject of the foreign power is under the protection of his sovereign, to whom the power prohibiting is answerable for the seizure of the property. He is bound to shew the grounds of the seizure, that it may appear to be justifiable. It ultimately comes therefore to be a question between the respective sovereigns, whether at peace with each other or at peace with all the world. Why is it that capture *jure belli* is made cognisable only in what are called prize-courts, but in order the better to preserve the relations of amity with other powers, with whom

the nation is at peace. The capture of a vessel of a neutral nation for a breach of a blockade, is triable only in a prize-court. In the *American* revolutionary war, the vessels of other nations trading with the revolted colonies, and seized, which case is analogous to that of *France* and *Hayti*, the capture, or rather *seizure*, as before the declaration of war with those nations it strictly was, could be triable only in the prize-courts. Could cases of this nature have been tried in the instance courts of Admiralty? Or were they exclusively cognisable in the prize-courts? A prize-court of a nation, may be considered in the light of a commission of inquiry on behalf of the sovereign of the captor, to inform the conscience of the sovereign, and direct his policy. This at least seems now the only use that is made of it. Does not the same sense of justice, or dictate of good policy, direct an inquiry in the case of a seizure for the violation of a prohibitory law, as in the case of a capture *de jure belli?* Is it not as necessary for the preservation of peace in the one case as in the other? Is there not as much reason that it be in the court of the sovereign peculiarly appointed for inquiring into cases where the relations with foreign powers may be affected, in the one case as in the other? I take it, that on principles deducible from the limitation of the jurisdiction of the *English* courts, a seizure of a foreign vessel for the violation of a prohibitory law, would be inquirable into *only* in the prize-court, and *not concurrently* in the instance court of Admiralty. If not concurrently in the instance admiralty court, the common law courts of *England* could not take jurisdiction. If so, we cannot; for it is to that jurisdiction only that we succeed, under the clause of the judiciary act of the *United States*, which saves the common law remedy. I lay aside the case of *Hughes and Cornelius*, or any other which may seem to countenance the idea that the legality of capture incidentally coming into view, but not so far as to affect the *res*, may be inquirable into in a common law court. For though it is the conclusiveness of the sentence of the foreign court of Admiralty, that is given as the reason of sustaining the change of property by the condemnation and sale, yet the paramount and better reason dedu-

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cible from principle would have been, that the legality of capture was a prize question, and not inquirable into in the common law court. It does not militate with this principle, that in a policy of assurance, of which the common law courts hold cognisance, the fact of condemnation may come into view, or that even the legality of the sentence may come into view, as some contend it ought to do; because this is a question, not between sovereign and sovereign, except so far as respects the subject of the sale and condemnation; and so far as respects that, we see that the prize-courts have exclusive jurisdiction. The legality of capture, condemnation, sale, &c. on a policy of assurance, is a collateral question by the terms of the policy, and is made a covenant, of which the common law courts have cognisance. It is not the condemnation, but the condemnability, in the case of a policy of assurance, that is in question; and which may be inquired into, independent of the fact of condemnation.

Considering forfeiture under a prohibitory law, as giving a right of seizure, in the same manner as the breach of blockade gives the right of capture, it will follow that the property forfeited may be pursued and taken on any seas, excluded only by the jurisdictional limits of another power; so that it would not make any difference with me, whether the seizure was within the territorial jurisdiction, or without upon the high seas, after a forfeiture legally incurred; nor whether the seizure was for the actual entry of a port, or for hovering within the jurisdiction, and raising the presumption of an intention to enter, such hovering being prohibited. As to the limits of the jurisdiction alleged to be violated, territorial jurisdiction seems to be what any nation chooses to make it, and what other nations will suffer it to be. If this extent is to be contested, it must lie with the sovereign power of a state to say what that of another shall be. I do not know that our government has said what shall be the territorial jurisdiction of *France, in Europe or the Indies;* and until that is done, we cannot say what it shall be: for the law of nations, which is a part of our common law, has not ascertained this distance without controversy. In case of vessels bound to the *United States*, our government exercises the right of *search* to the extent of *four leagues*,

In the opinion of *Azuni*, the territorial extent for the purpose of subjecting *vessels to the visit of revenue officers*, ought to be contracted, rather than enlarged as in the case of protection. I have not the facts of this case so fully in my mind, as to recollect with certainty whether the capture was of a vessel which had violated the prohibitory law, by entering a port of the island, or only by hovering within the two leagues, and subjecting herself to the reasonable suspicion of an intention to enter; or by having entered a port, and having escaped to a greater distance than two leagues; or by having only been within the two leagues, and having then escaped without the two leagues and been captured. But I take it that she had entered and traded, and had then escaped to a greater distance than two leagues; because if she had been taken within the two leagues, even hovering, without being able to account for it, there could be nothing said; or even if she had been hovering with intention to trade, and had afterwards escaped without the two leagues, I do not think she ought to be protected against seizure, or reclaimed by her country, much less if she had actually entered a port and afterwards escaped to any distance. I would consider her as liable to the penalty, wherever found, and seizable by the *injured power*, unless within the territorial jurisdiction of another state.

But it will be said, that whether capture as prize of war, or seizure for the violation of a prohibitory law, be alleged, it must be examinable whether such capture or seizure and condemnation have been legally made. The sentence of a foreign court of Admiralty will not conclude as to such capture, or seizure and condemnation, but the legality of these will be examinable to a certain extent. It is so determined by the Supreme Court of the *United States*. Going as they presume on the same law which is adopted in the *English* courts, they have determined in the case of *Rose* v. *Himely*, 4 *Cranch*. 241., that the capacity of the court to act upon the thing condemned, arising from its being within, or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence. "The court will examine the constitutional

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"powers of the tribunal, the character in which it acted, and "the situation of the subject on which it acted." I understand this to be spoken of any court, admiralty or common law court. If such a qualification of the general rule as to the conclusiveness of a foreign sentence can be supported, it may turn a capture, and what purports to be a condemnation, into a *marine trespass*, and give a common law jurisdiction; though it would seem to involve an inconsistency, to say that the primary and principal act of the court, the assuming jurisdiction, should be examinable, and not the justice of the adjudication; or that reasons of policy which forbid in the one case, should not exclude in the other; and this not confined to the courts of the sovereign of a peculiar jurisdiction, but that the sentence of even a foreign court of Admiralty is examinable to a certain extent in a common law court. Assuming this to be the law, let us examine the sentence in the case before us, as to its effect upon the property in question. It is said to be posterior to the sale. If so, it would seem that it would not protect the sale. The owner is not devested of his property by capture, but only by condemnation. If in the mean time it comes into his possession, by recaption, the vendee cannot set up the sentence as a bar; 2 *Burr.* 694.; though there has not been an actual recaption by the owner, but a legal one by attachment of a suit brought. For the vendee being in no better situation, until condemnation, than the captor, the property may be recaptured in his hands on the high seas, or attached within the municipal jurisdiction of any country, by applying to the laws which regulate the mode by which property wrongfully detained may be recovered. And under these laws, a suit instituted, must be the same thing as a manucaption or taking possession of the property. There would seem to be the same reason in the one case as in the other. Can there be a distinction taken between the case of seizure and the case of capture, with regard to a change of property? By the violation of the law, or declaration of the will of the sovereign, a forfeiture is incurred, and a right to seize accrues; seizure gives possession and an eventual right of property; but that right is suspended until the will of the sovereign is declared upon the particular subject. There can be no transfer in the mean

time, at public or at private sale. Even the officers of the capturing power can have no authority to transfer, until the will of the sovereign is expressed, and the seizure legitimated by a sentence of his court. It is contrary to the law of nations, and contrary to good policy, that it should be otherwise. For though there is no *jus postliminii*, no right of recapture in the case of seizure, it is because in the nature of the case it cannot exist, any more than in the case of a breach of blockade; the matter being between powers supposed to be at peace in the one case, and between powers at war in the other. An enemy may retake himself if he can, or his own vessel, and his sovereign will protect him; and it is not a question of right but of power to hold the property. But in case of a forfeiture, the penalty is incurred and the debt is due, and may be exacted without any right of self-deliverance; but, nevertheless, an act of the sovereign of the seizing power must pass upon it, in order to ascertain the subject, and the legality of the seizure made.

Admitting that there might be a change of property as *amongst the subjects of the seizing power*, by a sale by admiralty decision, can the courts of other nations regard a transfer that is not previously covered with a sentence of condemnation, that has not this to produce as the title deed or evidence of the property of the goods purchased?

The reason on which respect is paid to a foreign court of Admiralty, so as to protect the subject of a sale, is the maintaining the relations of amity with foreign powers. Is not a comity founded in this reason carried far enough, when we respect the sentence of the court, by supporting the sale made under it, without confirming it by relation? That is a step farther; and is there any good policy to warrant it? Is it not enough if they are protected after condemnation? The purchase is otherwise at the risk of the purchaser, that if he take the property out of the dominions of the power seizing, he cannot call upon the municipal law of another country to protect him.

But in this case it is said that the property is covered by a sale made by an agent of the foreign government, by the *French* agent at *St. Jago de Cuba*. The *British* government would seem, as in the case at *Lisbon*, to have commissioned

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consuls with special power to make sale of the perishabl property captured and brought in; and this as under the special and immediate order of the court of admiralty; and which sale will amount to a change of property, and protect the vendee, let the consequence be an acquittal or condemnation. If that be the usage, and it has become the law of nations, the law of the *French* government authorizing agents in cases of necessity, that is, in cases of perishable property, cannot have a less effect. In that case, the property here will be protected in favour of the vendee. The sentence however does not refer to this sale, or on the face of it ratify the sale. But in the case of a sale by an order of the Admiralty Court, which may be legally made, is it necessary that the sentence should recite and expressly sanction the sale? If not, why should it be necessary in the case of a sale by a consul, or an agent authorized by the sovereign of the captor?

But, *are not these considerations proper for the determination of the prize-court?* For, admitting that the Admiralty Courts of one nation, have a right to judge of the jurisdiction of the Admiralty Courts of another nation, though it would seem to involve an inconsistency to say that the assumption of jurisdiction, which is the principal and primary act of the court, and not the legality of the adjudication or sentence on the merits, should be examinable, the same reasons of policy which forbid in the one case, would seem to exclude in the other, and every court is presumed to be a competent judge of its jurisdiction; nevertheless, I say, admitting that the jurisdiction is examinable to a certain extent, is it competent to any but the Admiralty Prize-court to examine? "If "the taking has been as a prize, though from want of legal "condemnation there has not been a complete prize, claim "of restitution must be in the prize-court. If in any other "way a suit for restitution is proper in the instance court, "it is not easy to conceive such a case unconnected with "either piracy or war. We may however suppose or ima- "gine a case of possession unlawfully taken, where no cir- "cumstance of capture in war was concerned, as if there was "a disputed property in a ship, and one of the claimants "prevailed upon the master at sea to betray to him the pos-

"session previously held by the other. In such a case a suit "by the latter in the Admiralty for restitution would be "proper. Some think that such would be a case for the "instance court, and that the question of prize comes in "only incidentally; but surely taking as prize, though illegally, or purchasing from such a taker, is equally a question "for the prize-court, as legal capture and purchase thereof; "and accordingly the case of the *Perseverance*, *Pittar*, in "2 *Robinson's Rep.* which was of the former kind, was "tried in the prize-court. Where the consideration of property comes in incidentally, and in such a manner as is "not disputed between the parties, the court doth judge, "though the question of property can hardly there be said "to be before it; but the suit always purports to be in a "possessory cause civil and maritime."

These observations are extracted from 2d *Brown Civ. and Adm.* 113. 115., who goes on to add, that though such suits for restitution may be proper in the Admiralty, yet it may be asked whether the courts of common law have not here concurrent jurisdiction; for though the tort be committed upon the sea, the main question is a simple question of possessory right between man and man, and which in its nature savours not necessarily of a marine business. Lord *Mansfield* has answered this question in the case of *Lindo* v. *Rodney;* "a thing," says he, "being done upon the high sea, "does not necessarily exclude the jurisdiction of the courts "of the common law; for seizing, stopping, or taking a ship "upon the high seas, not as prize, an action will lie; though "for taking as prize, no action will lie. The nature of the "question excludes not the locality. The proper distinction "seems to be, that if the suit be in *rem* for the restitution "of the ship itself, the suit should be in the Admiralty. "If for *damages only*, *at common law*. But Sir *Leoline* "*Jenkins* agrees with the attorney and solicitor-general of "his time in opinion, that even for *spoil and damage* and "loss of time or demurrage occasioned by violence, suits "might be brought either in the courts of common law, or "in the Admiralty. But he adds weighty reasons for preferring the latter. Having, says he, the authority of two

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"such eminent persons in the law, that this cause of spoil is "cognisable in the Admiralty, I will only add besides, that "it has been always so, till some late interruption; and that "it is not without special ease and satisfaction to a foreign "plaintiff, that he shall have the benefit of the same marine "laws here, by which we are judged in his country: and "instead of entering as many actions of trover and conver- "sion as there are parties to the spoil, and proprietors of the "ship and goods, need enter but one single action in the Ad- "miralty. In many cases of this kind, an action of trover has "been brought, and in others the language of the court "seems to imply, that this or replevin was the more proper "method." p. 117.—"When formerly the Admiralty was "permitted to try petitory suits, or causes of property, di- "rectly, it was held that the sentence of the Admiralty on "the property of a ship taken upon the sea was final, *and* "*it should not afterwards be tried in trover.*" p. 113.—"The "ground of these determinations seemed to be, that where "the Admiralty has cognisance of the principal, it has also "of the incident; yet that is only where the whole makes "one continued act, and here the purchase is severed from "the first taking, and it becomes a mere question of pro- "perty on land. But this seems subtilty. The sale is surely "a continuation of the violence; and as we see that in the "prize-court the validity of such a sale after a capture in war "would be tried as inseparable from the prize question, why "should not the same rule apply in the instance court to "takings not by an enemy." p. 118.

So far the sentiments of this elementary writer, to which I subscribe, and add that I can see no distinction between the instance court being excluded from a proceeding in *rem*, and sustaining a proceeding for damages on account of the taking or detention, where the taking has been as prize. For the same reasons of policy would require the intervention of the peculiar jurisdiction of the prize-courts in the one case as in the other; and if questionable in the instance court of Admiralty, so at least in the common law court.

Are there not reasons arising from the constitution of the federal government, that render it necessary to confine the

jurisdiction of the common law courts of the states? The common law courts of *England* are national courts, though not the courts of the government, in other words the executive, as the admiralty courts in a great measure are in that country. But the courts of a state are not with regard to the states, the same as the superior courts in *England* are with regard to the whole people of *England*. This would seem to make a difference in policy, and to exclude more forcibly the jurisdiction of the common law courts, where prize may come in question, which is a question that involves the peace of the community of states, and ought to be alone cognisable in a court of the whole states.

This consideration would perhaps not seem to have been duly weighed by the legislature of the union, in the judiciary act, in saving a common law remedy in the state courts where the constitution would have warranted an exclusive jurisdiction to the courts of the union in all matters of admiralty jurisdiction, whether as instance or prize-courts.

But on the ground of policy I will consider them as not intending to give jurisdiction to the state courts, where prize, or its incidents or consequences come in question.

New trial granted.

3b 273
5b 27
5b 103
5b 107
1s r 195
5w 292
6ws 397
6 470
40 310
82 31
85 162
108 563

The Commonwealth *against* the Judges of the Common Pleas of Philadelphia County.

Philadelphia, Saturday, December 22.

A mandamus does not lie to the judges of the Common Pleas to reinstate an appeal which they have dismissed; because in the first place their order of dismission is an award in the nature of a judgment upon which a writ of error lies; and in the next place because a mandamus cannot go to an inferior court to compel them to make any particular decision, but merely to decide, which the Common Pleas have already done.

2d. Whether a mandamus from this court, lies to the Common Pleas.

IN this case *T. Ross* moved for a rule upon the judges of the Common Pleas of *Philadelphia* county, to shew cause, why a mandamus should not issue, commanding them to admit an appeal from the judgment of an alderman, in the case of *Lee* v. *Ridgway*.

The facts upon which the motion was founded were these. On the 22d *July* 1809, *Lee* obtained a judgment by default against *Ridgway* for 68 dollars, before an alderman of the

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city, and on the 26th of the month, *Ridgway* entered an appeal and gave bail to prosecute it with effect. The transcript of the alderman's judgment was not filed in the office of the Common Pleas until the 15th of *August*, which was 24 days after the judgment; but it was at the same time several days before *the next court* after the judgment was rendered. The president of the Common Pleas, being of opinion that the transcript should have been filed within 20 days after the judgment, upon motion by the plaintiff's attorney, ordered the appeal to be struck off; and it was now the object of *Ross* to have it reinstated.

He argued that the appeal had been struck off contrary to the plain interpretation of the law by which it was given; for the 4th section of the act of 28th *March* 1804, 6 *St. Laws* 385., having given to either party the right to appeal within twenty days after judgment, upon his entering special bail, the 6th section directs that the recognisance of bail shall be conditioned for the party's appearance at the *next court* of Common Pleas, to prosecute his suit with effect &c.; so that the transcript is filed in time on or before the appearance day of the next term, the act not requiring any thing to be done in that court by the appellant before his appearance. Hence the judges of the court had no right to quash the appeal; and the defendant having no other remedy, the court will grant him the writ of mandamus. This writ issues from the King's Bench in *England* to all inferior courts of judicature, requiring them to do something which appertains to their office and duty, and which the King's Bench has previously determined to be consonant to right and justice. 4 *Bac. Ab.* 495. It has been liberally interposed in modern times for the benefit of the subject; and nothing more is necessary to induce the use of it, but the applicant's having a legal right, and no other specific remedy. Such seems to be the situation of *Ridgway*. He has a clear legal right; and he has no remedy by writ of error, the only other writ which can be thought of, because in fact the appeal is struck from the record of the Common Pleas, there is no judgment or proceeding before them, and the party is now in the same situation in which he stood before the transcript was filed.

The power of this court to issue the writ cannot be denied. Under the act of 1722, 1 *St. Laws* 171., they are intitled to

exercise the same jurisdiction and power in examining and correcting the errors of the Common Pleas, and "*to minister justice to all persons* as fully and amply to all intents "and purposes whatever, as the justices of the court of King's "Bench, Common Pleas, and Exchequer, at *Westminster*, or "any of them, may or can do." More ample jurisdiction cannot be required. It assimilates this court to the King's Bench in the matter of mandamus, as well as in other points; and it was expressly confirmed to the court by the 5th section of the 5th article of the constitution, and by the act of 13th *April* 1791., 3 *St. Laws* 92., which reorganized the judicial establishment after the adoption of the constitution.

TILGHMAN C. J. This is a motion for a rule on the judges of the court of Common Pleas to shew cause why a mandamus should not issue, commanding them to admit an appeal in the case of *Lee* v. *Ridgway*.

An appeal was entered in the court of Common Pleas from the judgment of an alderman of the city of *Philadelphia*, under the act of 28th *March* 1804, 6 *St. Laws* 383., sect. 4, commonly called the one hundred dollar act. The court of Common Pleas, conceiving that the appeal was not entered according to law, ordered it to be struck off.

There are many difficulties in the way of this motion. Without entering into the right of this court to issue a mandamus to the court of Common Pleas, should a proper case be brought before us, it is to be observed, that in the present instance, the court of Common Pleas has proceeded to give judgment, or at least to make an order in a cause which was entered on their records. In the case of the *United States* v. *Lawrence*, 3 *Dall.* 42., it was determined by the Supreme Court of the *United States clearly and unanimously*, after full argument, that although they might command an inferior judge to *proceed to judgment*, yet they had no power to compel him *to decide* according to the dictates of any judgment but his own. Upon this principle it would be improper for us to issue a mandamus, because the court of Common Pleas have already decided according to the dictates of their own judgment. But there is another reason decisive against the motion. It is conceded by the counsel who made

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it, that if a writ of error lies in this case, a mandamus ought not to issue. It appears to me that a writ of error does lie. The rule is, that a writ of error lies in all cases where a court of record has given a final judgment, or made an award in nature of a judgment. 9 *Vin. Abr.* 474. *A.* 2. *pl.* 6. Now the striking off the appeal is certainly in nature of a judgment. It is the act of the court dismissing the appeal, and thus making an end of the cause. It matters not in what form this order is made. It is substantially in nature of a judgment. I am therefore of opinion, that the rule should not be granted.

YEATES J. I intirely abstain from intimating any opinion, whether under the constitution of our courts, a mandamus would properly lie from this court to any of the courts of Common Pleas of this commonwealth. Admitting however, that such would be a legal remedy, I do not apprehend that it would lie in the present instance. In the case of *Lee* v. *Ridgway* pending in the Common Pleas, and which was submitted to arbitration under the one hundred dollar act passed 28th *March* 1804, that court held, that the transcript of the record should be filed on the appeal within twenty days after the decision, and for defect thereof in that case, the court dismissed the appeal. This I take to be a final judgment on which a writ of error would lie, and a complete remedy be afforded to the party, in case the opinion of the court below on the construction of the act of assembly was incorrect. While the order of dismission is in full force, nothing further remains to be done in that court. It is admitted, that a mandamus will only lie, where there is no other specific remedy; but such remedy occurring here, I am of opinion, that the rule to shew cause why a mandamus should not issue to the justices of the court of Common Pleas, be denied.

BRACKENRIDGE J. gave no opinion, having been engaged in holding a court of *Nisi Prius* during the argument.

Rule refused.

3b 277
8s 340
11 405
126 101

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BARRY *against* RANDOLPH.

IN ERROR.

Philadelphia, Saturday, December 22.

Every court of record has an inherent power to make rules for the transaction of its business, not contradictory to the law of the land. Under this power the Common Pleas have a right to make a rule, that the party appealing from the award of arbitrators shall give his opponent notice of the time and place of entering the appeal, and the name of his surety, although the act of assembly does not require it.

UPON a writ of error to the Common Pleas of *Philadelphia* county, the case was thus: An award was made by arbitrators in favour of *Randolph* the plaintiff below, from which the defendant appealed, and entered into the recognisance required by law; but no notice of the time and place of entering the appeal, and of the name of the surety, having been given to the plaintiff, in conformity with the following rule, the Common Pleas struck off the appeal. "*December* 16, 1809. Ordered that the party appealing from "the report of the arbitrators, shall give notice in writing "to the opposite party or his attorney, of the time and "place of entering the appeal, and of the name of the per- "son to be security on the appeal, and that four days shall "be allowed to the opposite party to file exceptions to the "sufficiency of the bail, and that notice of filing the excep- "tions shall be given in writing within the said four days "to the appellant or his attorney. And it is further ordered, "that the bail shall justify within four days after such no- "tice, before the prothonotary of the court, or a judge in "his absence; and that notice in writing of the time and "place of such justification of bail, shall be given to the op- "posite party or his attorney." This rule was rescinded on the 16th *June* 1810, after the appeal of the plaintiff in error had been struck off.

Phillips, for the plaintiff in error, contended that the rule was invalid, because the 11th section of the arbitration law, 9 *St. Laws* 149., gives an appeal to the dissatisfied party "under the rules, regulations, and restrictions" therein set forth; but there is no requisition of notice to the opposite party or his attorney. The Common Pleas seem to have been of the same opinion, by rescinding the rule.

Shoemaker contra. The Common Pleas found it impossible to do justice to either party without the rule. The appellee was liable to imposition by getting merely sham bail upon the

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appeal; and the appellant might lose his appeal altogether, if his antagonist might file exceptions after the time of the appeal had elapsed. They had power to make the rule, under their general authority to institute all such regulations, not contrary to law, as they think necessary or expedient to facilitate business.

TILGHMAN C. J. The only question in this case, is, whether the court of Common Pleas had power to make the rule, obliging the appellant to give notice of the time and place of entering the appeal and of the names of the sureties. Every court of record has an inherent power to make rules for the transaction of its business, provided such rules are not contradictory to the law of the land. The act of assembly on which this question arises, directs, in sections 11th, 12th, and 13th, that the party appellant shall within fifteen days after the entry of the award of the arbitrators on the docket, enter his appeal with the prothonotary, and that he shall within the same period, enter into a recognisance, with one or more sufficient sureties, with the prothonotary, the condition of which shall be as mentioned in the act. But who is to judge of the sufficiency of those securities? No person being expressly mentioned, it must be intended, that it must be judged of by the court in which the action is depending. It is reasonable therefore that the court should have power to lay down some rule for the better conducting of this business, especially as the appeal may be entered, and security offered, at a time when the court is not sitting. All that is required by the rule, is, that before the recognisance is entered, the adverse party shall have notice of time and place, and of the names of the persons intended to be offered as securities, in order that he may have an opportunity of inquiring into their circumstances. There is no hardship in this. Indeed the rule seems calculated as much for the interest of the appellant as his adversary. For if the appellant was to enter insufficient security, without affording the adverse party an opportunity of objecting within the fifteen days, and after the expiration of the fifteen days, the security was to be objected to, and proved to be insufficient, the appellant would be absolutely cut off from his appeal. Whereas this rule affords the means of putting

him on his guard, and enabling him to find good security in time, if the first prove insufficient. Finding nothing then unreasonable or against law in the rule of the court of Common Pleas, I am of opinion that the judgment should be affirmed.

YEATES J. It has been objected by the counsel of the plaintiff in error, that the court of Common Pleas had no power to make their rule of practice of the 16th *December* 1800, the law of the 25th *September* 1786 extending only to this court.

Independently of all authorities to be found in the books, it is self-evident, that justice could not be administered in an orderly manner, under a complex system of laws, without rules regulating the practice of the courts of justice. These courts must necessarily have the power of framing such rules, as they may think best calculated to carry the laws into execution with convenience and despatch. All courts must have stated rules to go by; which may be altered at pleasure, as they may be found best to answer the public good. 1 *Stra.* 315., 1 *W. Bla. Rep.* 264. Courts possessed these powers antecedently to any act of the legislature on the subject. A familiar instance may be given.—We find amongst the rules of this court, established in *January* term 1788, a regulation, that on the removal of the proceedings on a road by *certiorari*, this court will not enter into the merits of the road, unless the sessions have exceeded their jurisdiction, or have erred in point of law, or proof be made of corruption or partiality in the justices below, or of fraud or undue practice in the parties or viewers. A rule of the same kind precisely subsisted before the *American* revolution. It is true no rule can be made, which would devest a citizen of any legal right; but that objection does not hold in the present instance. Such a regulation, I apprehend, tends to facilitate the execution of the true intention of the legislature, by securing to the plaintiff a sufficient surety to answer his demand in the event of the judgment of the justice being affirmed; and though this rule has been rescinded on the 16th *June* 1810, yet as the court of Common Pleas had a right to frame the rule, and the defendant did not think

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proper to conform thereto, I am of opinion that they were well justified in striking off the appeal.

I think the judgment of the court of Common Pleas should be affirmed.

BRACKENRIDGE J. gave no opinion, having been absent at *Nisi Prius* during the argument.

Judgment affirmed.

3b 280
5r 253

Philadelphia, Monday, December 31.

A capias may issue for any cause of action whatever against a freeholder, who neglects to put in special bail upon notice. *ex. gr.* for *slander*.

JACK *against* SHOEMAKER.

IN this case, the plaintiff's attorney gave notice to the defendant to enter special bail on or before a certain day, in the office of the prothonotary of this court, and upon his neglecting to do it, issued a *capias ad respondendum*. The notice and the writ were in *case*, without designating the particular cause of action; but from a written communication by the plaintiff's attorney to the defendant, it appeared to be *slander*. Upon affidavit of these facts, and of his owning a freehold to a greater amount than the bail required, the defendant obtained a rule to shew cause why the capias should not be quashed with costs, upon the ground that he was a freeholder; and now upon the return of the rule,

C. J. Ingersoll for the plaintiff argued, that by the act of 20th *March* 1724-5, 1 *St. Laws* 223., and the invariable practice under it for half a century, the defendant, notwithstanding his freehold, was liable to arrest for neglecting to enter special bail. The first section of that act directs that no person, having a certain freehold, shall be liable to arrest in any civil suit, except in the king's case, or where a fine is due to the king, or "*unless they be such freeholders as by this act are made liable to be arrested;*" and the second section describes the kind of freeholder thus liable, as a defendant who "has signified his intention of going to sea, or of removing "out of this province, or lurks in secret places, or conceals "himself in his own or other's house, or has refused or ne-

"glected upon demand to give either real or personal security for the debt, *or refused without process to appear and put in special bail* to the plaintiff's action for the debt *or cause for which he complains* &c." It is of no moment what the cause is for which the plaintiff complains; the expression embraces all causes, and so has been the practice. It may as well be for slander, as any thing else; because it never has been the practice in this state to obtain a judge's order to hold to bail previous to issuing the writ, in those cases where bail is not of course; and there being no difference between slander and other causes of action as to the manner of instituting them against others, there is no reason for any difference in instituting them against freeholders. If the freeholder is not liable to bail, he can cite the plaintiff to shew his cause of action. All the plaintiff wants in this case is the defendant's appearance; he will waive the bail.

The Court being desirous to ascertain what the practice had been under this act, appealed to the gentlemen of the bar, the experience of one of whom, Mr. *Edward Tilghman*, went back to 1767. They concurred in stating, that the practice had not been to obtain a judge's order to hold to bail in those cases where bail was not of course, but the right to bail was discussed after the arrest, upon a citation or rule to shew the cause of action. That notice had been given to freeholders to enter special bail, and upon neglect, a capias had issued, in all cases indiscriminately. Some of the bar recollected cases of slander, where precisely the same course had been taken as in the present instance, without question.

Sergeant for the defendant said that a practice however uniform, which had passed *sub silentio*, could not prevail against an act of assembly. The object of the act in question was no doubt to confer a privilege on freeholders, in consequence of the presumed stability of their estate, and the security of their creditors; but the plaintiff's construction reduces it to a very idle ceremony, a written notice of a day or two preceding the capias. It in fact places the freeholder in a worse situation than other defendants; for if he complies

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with the notice, and enters special bail, he cannot undo it afterwards; and he may thus be compelled to give bail, where it is not demandable, and where a common defendant could not. The intention of the act was to confine this notice to enter special bail, to cases of debt and contract exclusively. All the provisions of the second section have regard to the case of an embarrassed freeholder, who is unable or unwilling to meet his engagements. Removal from the state, concealment, refusal to give security for the debt, suffering judgments to be entered against him, assigning over his estate, not having an estate clear from incumbrances sufficient to pay the debt demanded, all these limit the signification of the terms *cause of action*. to the case of debt or duty or contract for the performance of a duty; to cases in which the plaintiff has a right to ask special bail, and where the defendant may be supposed to do wrong in refusing it, and therefore justly to forfeit a privilege. It seems a most extraordinary provision, to take away a privilege in consequence of the party's refusing to do that, which according to the regular and correct practice of the law, he is not obliged to do.

TILGHMAN C. J. The defendant has obtained a rule to shew cause why the plaintiff's writ should not be quashed, with costs, because he, the defendant, being a freeholder, was privileged from arrest. The question arises on the act of 20th *March* 1724-5. The plaintiff has shewn, that previous to the issuing the writ of capias, he gave written notice to the defendant, to enter special bail, in an action *on the case*, which was not done.

If we were now called upon for the first time to construe this act of assembly, I think it ought to receive a strict construction. Though well adapted to the industrious and economical habit of the times, when it was made, it is not so suitable to the manners of the present day. In the infancy of the country, there was a stability in property, which afforded a presumption, that he who was a freeholder at the beginning of a suit, would continue so to the end of it. But not so now, when from the vast increase of luxury, the risks of commerce, and the unrestrained spirit of speculation, we see freehold estates pass in rapid circulation from owner to owner.

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The first section of the act directs, that freeholders shall not be arrested by writ of capias in civil suits, "unless "they be such freeholders as by this act are made liable to "be arrested." The second section contains a proviso pointing out various cases in which freeholders shall be liable to arrest, one of which is, "where the defendant hath upon de- "mand, neglected or refused without process to appear, "and put in special bail to the plaintiff's action, for the "*debt, or cause for which he complains.*" The latter part of this section declares, that in all the preceding cases, *writs of arrest shall be granted*, and the defendant held to special bail, if the case requires it. The plaintiff has brought his case within the words of the act. The defendant has neglected to enter special bail, on demand, to the plaintiff's action, for the cause for which he complains. It is argued for the defendant, that the intention of the act was confined to cases of *debt* or *contract*. I cannot think so; because there are many cases besides debt or contract, where special bail ought to be given. But then, says the defendant, under this construction, freeholders are in a worse situation than other persons, because they may be compelled, at the risk of losing their privilege, to enter special bail in cases where it is not lawfully demandable; as in the present instance, where the cause of action is understood to be slander. This is not the case. For when a freeholder receives notice to enter bail, he may cite the plaintiff to shew his cause of bail, and if the judge is of opinion, that the defendant ought not to be held to bail, he may order that his appearance be accepted; or perhaps he may forbid the issuing of a capias, although as to that I give no opinion. Now it seems to be a sufficient protection to freeholders, that in no case can they be arrested without notice, and without failing to do something which they ought to do. If the action requires special bail, they may put in bail, and thus prevent the issuing of the capias; and if it does not require bail, they may by resorting to a judge, procure an order, which will render the arrest merely a form, without real injury or inconvenience.

I have said that the case has been brought within the words of the act, which if now to be first construed, ought to receive a strict construction. But it appears to have long

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ago received the construction contended for by the plaintiff, not indeed by any decision of this court, but by uniform unopposed practice.

The oldest gentlemen of the bar declare, that writs of capias have issued in all cases without exception, against freeholders, who neglected to enter special bail after demand.

We have received positive evidence of this practice as far back as the year 1767, and there is no tradition of any thing to the contrary. I will not say, that even long practice *sub silentio*, should prevail against the clear meaning of an act of assembly. But if the meaning of the act should appear doubtful, I should be decided by the practice. I think the most that can be said in this case, is, that the act is not quite clear. I have therefore no hesitation in construing it according to the practice. Whether the defendant should be held to bail is another question. I understand however, that it will be unnecessary to enter into it, as the plaintiff's attorney asks only an appearance without bail.

I am of opinion that the rule should be discharged.

YEATES J. The question in this case is, can an action of slander be originated against a freeholder, by a notice served upon him to enter special bail in the prothonotary's office within a given period; and on his neglecting or refusing so to do, can a capias legally issue against him?

By the act "to regulate the practice upon writs of sum-"mons and arrest" passed 20th *March* 1724-5, 1 *Dall. St. Laws* 223., the proceedings against freeholders are directed to be in a certain specified form by summons; and they are not to be arrested and held to special bail, unless in particular enumerated cases. Amongst these, it appears by the 2d section, that a capias may issue against a freeholder, "where "he has refused or neglected upon demand to give either "real or personal security for the *debt;* or refused, without "process, to appear and put in special bail to the plaintiff's "action for the *debt or cause* for which he complains." *Cause of action* are most general and comprehensive words, and certainly include in their legal signification suits for slander.

But it has been objected, that the intention of the legislature was, to give this mode of procedure only in cases of debt or contract, or where the cause of action was of a bailable nature; and that a different construction of the law would subject freeholders to many hardships and inconveniences. To this it is answered, that there is no ambiguity in the expressions made use of; but if they were really dubious, the sense affixed to them for many years, would be a good rule to go by in their exposition. *Vaugh.* 169. Bail is not demandable of course, in actions of slander. In *England*, the practice is to obtain a judge's order in such cases, founded on affidavits stating special damage, or peculiarly aggravated circumstances, &c. But no such practice has obtained in the courts of justice of this state. If a defendant is held to bail in an action, wherein no bail is required by law, he obtains redress by citing the plaintiff to appear before a judge of the court in vacation, or the court when sitting, to shew his cause of action, who make the proper orders therein on a hearing.

The same remedy is open to the party, on whom notice is served to enter special bail without just grounds; and I can see no hardship or inconvenience in the latter case, which may not occur in the former. Where a party is maliciously held to bail, the policy of the law gives him another mode of redress, by his action for damages.

I cannot consider the practice which has subsisted in this state, either as bad in itself, injurious in its operation, or as militating against the law which has been cited. Abundant proof has been given of it, by the different gentlemen, who have been called upon during the argument. It is most probably coeval with the act itself. It was in full operation in 1761 within my own knowledge. The maxim that "*contemporanea expositio est fortissima in lege*," has always prevailed. 2 *Inst.* 11, 136. And so far has this principle been extended, that in *Stuart* v. *Laird*, 1 *Cran.* 299., in the Supreme Court of the *United States*, *Patterson*, justice, in delivering the opinion of the court, expresses himself thus: "Practice, and "acquiescence under it for a period of several years, com- "mencing with the organization of the judicial system, fixes

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"the construction of the constitution of the *United States*. "It is a contemporary interpretation of the most forcible "nature. This practical exposition is too strong and obsti- "nate to be shaken or controlled. Of course the question "is at rest, and ought not now to be disturbed."

I am therefore of opinion, that the rule to shew cause why the proceedings in the present case *should not* be quashed, be discharged.

BRACKENRIDGE J. The construction put upon the act of assembly by the practice which would seem to have prevailed in this and some other districts, will warrant what has been done in the present case, though it is not the construction that I had put upon it in my practice; and it would seem to me to reduce the freeholder's privilege intended by the act to very little, if in any case, he is liable to an arrest, where on *demand made, he refuses to appear, and put in special bail.* I had applied this to the preceding excepted cases of having signified an intention to remove, or of being incumbered &c., and had thought that the *or* was to be construed, *and* if in such cases he refused to appear and put in special bail. But I will admit that the act is ambiguous, and that it is difficult to ascertain the meaning beyond a doubt; and it would seem to require the explanation of the legislature, by a declaratory act on this head. Were it a new case, independent of construction put upon it by usage, I should think myself justifiable in giving the construction that I take to be most in favour of the freeholder. It is an inconvenience, when no intention has been manifested of evading payment by removing, when no incumbrance lies upon the estate, and no danger of losing the debt appears, to be nevertheless liable to be called upon, not *only to appear, but to put in special bail*, or to submit to an arrest. For though the capias may be indorsed, "*the defendant's appearance accepted*," yet this supposes a previous arrest, and the laying on of the hands of the officer; and he could not return "cepi corpus" and the defendant's appearance accepted, without it. On the construction however, which seems to have been put upon this act for such a length of time, of which evidence has been given, I cannot undertake to say that the process which has

issued with an indorsement of appearance accepted, is illegal, and that we can quash the writ with costs, as in the case of process unquestionably illegal, and without ground to support it.

Rule discharged.

ADAMS *against* The DELAWARE INSURANCE COMPANY.

Philadelphia, Saturday, January 5, 1811.

An abandonment after acquittal, and after an order of restitution has been given by the court of last resort to the agent of the assured, is too late, notwithstanding it be made before actual restitution by the captors.

It is the state of the *fact*, and not the state of the party's *information* at the time of an abandonment, that is to test its validity.

THIS cause was argued upon a statement of facts, which in substance were these:

The plaintiff, on the 15th *April* 1806, caused insurance to be effected by the defendants upon goods by the schooner *Hazard*, at and from *Philadelphia* to *St. Jago de Cuba*, and at and from thence to *Philadelphia;* 7000 dollars at eight per cent. The schooner, having the plaintiff's goods on board to the amount insured, was taken in the prosecution of her voyage outward, on the 10th of *May*, by two *French* armed vessels, who took out part of her crew, replaced them with a prizemaster and men, and carried her to *Samana*, a small island near the east side of *St. Domingo*, where she arrived on the 21st of *May*. On her arrival, proceedings were instituted against her in the tribunal *de première instance* at *Santo Domingo*, to which place the captain went, leaving his mate, a cook, and boy on board the schooner, the hatches of which were sealed by the *French* commissary, and her sails unbent, and put below. On the 6th of *June* the schooner and cargo were acquitted. The captors appealed; and on the 10th of *June* the sentence of acquittal was affirmed in the tribunal of *the last instance*, and the property ordered to be restored. The captain returned as soon as possible to *Samana*, carrying with him the decree of acquittal, and the order of restitution. He arrived on board his vessel about 9 o'clock on *Saturday* evening the 21st of *June*, and being fatigued, immediately retired to rest. The next morning, being *Sunday*, the *French* officer, on the exhibition of the

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order of acquittal and restitution, took off the seals from the hatches, redelivered to the captain possession of the vessel, which till that time he had retained as before mentioned, and the captain immediately prepared for his departure. On the 25th of *June* he sailed from *Samana*, and arrived in safety at *St. Jago*.

On the 21st of *June*, the insured having on that day received from the captain a letter of 22d *May*, informing of his capture and arrival at *Samana*, communicated it to the defendants, and tendered an abandonment, before nine o'clock in the evening.

The question for the opinion of the court, was whether the plaintiff was intitled to recover for a total loss, or only for a partial loss.

Levy for the plaintiff. The point has been many times decided, that while the owner is kept out of the possession and control of his property by the captors, their agents, or government, he is intitled to abandon, provided he does it within a reasonable time. It is this circumstance, the having lost his power over the property insured, that intitles him to substitute the insurer in his place. Hence as between insurer and insured there is a total loss, although the property is never condemned or carried *infra præsidia*. *Goss* v. *Withers*. (*a*) Hence he is not obliged to wait the event of capture. 2 *Marsh*. 510. At any time during the detention he may make his election. 2 *Marsh*. 563. And whether the detention be by friends or enemies, 2 *Marsh*. 511., by hostile capture, or by embargo, 2 *Marsh* 508., this privation of the control of his property, is a total loss within the policy, if he elects so to consider it. By the law of *France* indeed, the ship being once captured, it is always a total loss; and the legal effect as to abandonment continues, though the ship be released or retaken. 2 *Emerig*. 188. From these principles it results, that whatever be the futility of the pretence under which the capture or detention takes place, or however clear and immediate the prospect of restoration, still if the owner has not possession and control at the time of abandonment, that act is valid. The case of *Dutilh* v. *Gatliff* (*b*)

(*a*) 2 *Burr*. 694. (*b*) 4 *Dall*. 446.

is in point. The vessel there was carried into *Nassau*, libelled as prize, and on the 9th of *November* acquitted. The abandonment was made four days afterwards, when she was still in the custody of the captors, and in five days after that she was delivered over to the claimant. By what argument could this court sustain the abandonment in that case, and not do it here? The actual, involuntary custody of the captor, existed at the time of abandonment here as well as there, and this was the governing circumstance. We are therefore intitled to a total loss.

But there is another fact. The plaintiff had no notice of the restoration at the time of the abandonment; and there are respectable authorities to shew, that under such circumstances the abandonment is valid. It was precisely the point decided by the Supreme Court of *New York* in *Murray* v. *The United Insurance Company*, (*a*) where the vessel was released on the 18th of *June*, and the abandonment was made on the 3d of *August;* and there is something in the nature of the contract, and something also in one of the stipulations of the insurer, which strongly countenances this opinion. The assured is bound to make his abandonment in a reasonable time, or he loses his right. His obligation to abandon depends upon the intelligence he has received; his right therefore would seem to depend upon the same thing. He can act only upon what he knows; and where a capture as prize has actually taken place, giving him a right to abandon, if he exercises it while it appears to continue, a restitution should be considered as for the account of the insurer. But the insurer positively agrees to pay within thirty days after proof of loss. In case of capture as prize, the loss may be proved without difficulty; and although at the time of abandonment the restitution be made, still if there is no knowledge of it until thirty days thereafter, the stipulation binds the underwriter to pay. It seems to amount to an agreement to take the state of the party's information as the rule, where there has actually been a technical total loss, of which proof can be made.

(*a*) 2 *Johns. Cases* 263

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Condy and *Rawle* for the defendants. The point is a very short one, whether after an order of restitution by the court of *last resort*, the assured may abandon. If the effect of an acquittal can be defeated by an appeal, as in the case of an acquittal by a subordinate tribunal, if any legal arrangement may supervene, before actual restoration, to continue the custody of the captor against the will of the captured, there may be good reason for arguing that the abandonment is in time. That was the case in *Dutilh* v. *Gatliff*, where the acquittal was in the vice-admiralty of *New Providence*, and the captors might at any time have entered an appeal to *England*, until actual redelivery. It does not appear indeed, that in that case there was a writ of restitution. But in the present instance, the acquittal and order of restitution were by the court of last resort, whose decree could not be impugned. The vessel in point of law was therefore restored. The custody of the captors was only until demand could be made by the captured. It was not against the will of the latter. The property was under his control, the instant he could claim to exercise authority over it, and what is this but restitution? The delay was attributable to the captain, not the captor. It lies upon the plaintiff to shew, that at least there was danger that the custody of the captors would continue notwithstanding the decree and order, as by a reconsideration of the sentence, or the like; for otherwise the court must presume there was none. The very case has been decided in *Marshall* v. *The Delaware Insurance Company*, (*a*) where the actual restoration of the vessel was made on the same day with the abandonment, but the restitution was ordered before.

The same case decides that the loss must continue total to the time of the abandonment, in order to justify it, and that the state of the party's information is not of the least importance. It was likewise so decided in *Rhinelander* v. *The Insurance Company of Pennsylvania* (*b*), in *Bainbridge* v. *Nelson* (*c*), and in the case of *Church* v. *Bedient* (*d*), in the *New York* court of errors, in direct opposition to the case

(*a*) 4 *Cranch* 202.
(*b*) 4 *Cranch* 46
(*c*) 10 *East* 329.
(*d*) 1 *Caines' Cases* 21.

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of *Murray* v. *The United Insurance Company*, which was decided in the Supreme Court three years before. It has the sanction of the great name of lord *Mansfield*, who was so desirous of preventing the contract of insurance from being more than an indemnity, that he doubted in *Hamilton* v. *Mendez*, (*a*) whether the loss should not continue to the time of action brought, or even to verdict. The plaintiff's doctrine would open a field of litigation without limits; and it would also lead to innumerable frauds, by putting it in the power of the assured to fabricate information precisely fitted to his interest. When the *fact* and not the information is the rule, it is a question easily susceptible of proof, and one which it is impossible to perplex by counterfeit representations, or by rumors, which would perpetually rise up to embarrass the question of information. But above all, the policy is a contract of indemnity against real not imaginary losses; and it is absurd to say that a man has incurred a loss at the time of abandonment, because six weeks before, a state of things existed, which, if it had continued, would have amounted to a loss. The plaintiff must shew its actual continuance.

Levy in reply. It is a very erroneous application of a general principle, to consider the decrees and orders of restitution of a *French* court sitting at *Santo Domingo*, under the control and revision of a military chief, as amounting to the performance of what they promise. The courts of that nation generally have been distinguished from those of other nations, by the Supreme Court of the union, who have allowed salvage to the recaptor of a neutral captured by the *French*. Certainly the arm of the executive officer could at any time have intervened to prevent the execution of the order; and many are the cases even in old *France*, where after a compromise with the captors, and an acquittal by the prize-court, the property has been retained by order of the government. With them there is no restitution but actual restitution; and until that time the right of abandonment does not cease. In *Dutilh* v. *Gatliff* no appeal was entered; and where that ceremony does not take place, there

(*a*) 2 *Burr.* 1198.

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is no difference between an acquittal in a court from which an appeal lies, and one in a tribunal of last instance.

TILGHMAN C. J. delivered the opinion of the court.

If we consider the final event in this case, there was in fact but a partial loss. The vessel and cargo were captured by the *French*, and carried into port; they were acquitted by the court of Admiralty judging of matters of prize, in the first instance, the captors appealed, and the decree of acquittal was affirmed by the court of the last resort; in consequence of which, the vessel and cargo were restored, and the voyage on which the insurance was made, was completed. But there was at one period, a total loss by capture, and an abandonment by the plaintiff, at a time, when he supposed that such total loss continued. This abandonment was made after the final acquittal, and order for restitution, but before restitution was actually delivered. The plaintiff's counsel seemed to consider it as a doubtful point, whether it was not sufficient to recover for a total loss, if the abandonment after capture was made at a time when the plaintiff *supposed*, from the information received, that a total loss existed, although in *fact*, it had ceased to exist, by an actual restitution. Considering the decisions which have taken place in the Supreme Court of the *United States*, and the courts of several of the states, and the strong reason on which those decisions are founded, I look upon that point as at rest. It is the *actual* and not the *supposed* state of things at the time of the abandonment, that must govern the case. There is nothing in the nature of the contract, from which it may be inferred that the rights of the parties are to depend upon *supposed losses*. When the assured hears of a loss, if he means to claim for a total loss, he should give speedy notice of his intention to abandon. But whether or not there be at that time a total loss, is a fact to be proved. To say that the total loss exists, because you have been informed so, is bad reasoning. To say that it exists *then*, because it existed *some time before*, is begging the question. Capture and adverse detention, while they continue, are considered in *law* as a total loss; but in their *nature*, they certainly are not so, because there is a chance of recapture or restitution. It ap-

pears to me, that the right of abandonment on these artificial or technical losses, may be carried so far as to produce mischief. It tends to divert the contract of insurance from its original intent, which was the indemnification of the assured in case of loss. It often creates an anxiety in the assured not to pursue the voyage, but to throw it upon the underwriters, and may lead to improper practices. I am therefore not for extending it, farther than it has been already carried. I beg it may be understood, that I have not the least suspicion of any improper conduct in the plaintiff. There is nothing in the evidence to warrant it. What I have said is the result of my general observation on a variety of cases which have occurred.

The plaintiff's counsel contends, that in the present case, the total loss existed at the time of the abandonment, because restitution was not actually made. But the court, from which there was no appeal, had directed an acquittal, had made an order for restitution, and the captain of the vessel, with the order in his pocket, was on the point of obtaining restitution. The Supreme Court of the *United States* decided, in *Marshall* v. *The Delaware Insurance Company*, 4 *Cranch* 202., a case circumstanced precisely like the present, that the total loss had ceased to exist. But the plaintiff relies on our own decision in the case of *Dutilh* v. *Gatliff*. It will be found however, that between these two cases, there is a striking difference. In *Dutilh* v. *Gatliff*, the decree of acquittal was by the *English* court at *Nassau* in *New Providence*, from which an appeal lay to a superior court in *England*, and from the state of the case on which the court decided, it did not appear, whether at the moment of abandonment, the case was not open to an appeal. I presume it was, because no order for restitution had been issued, and the vessel remained in the custody of the captors. While the case remains open to an appeal, and the property is held by the captor, the peril cannot be said to be over. But when no appeal lies, and the party is in possession of an order for restitution, there is a reasonable presumption that the property will be immediately restored. It has been urged indeed, that in these times of violence and confusion, the danger never ceases till restitution is actually

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made; that there was no certainty in this case, that the executive power would not arrest the course of justice. I cannot say that there is not, in fact, some weight in this observation. But it would be dangerous ground for this court to take. We have always hitherto considered the courts of all foreign nations as on the same footing, and intitled to the same respect. The Supreme Court of our nation acts on the same principle. There is no reason therefore why we should depart from it in this instance. To say that the loss remained total, at the time of abandonment in this case, would be going farther than this court have ever gone; and for the reasons already assigned, I am against extending the right of abandonment. It is the opinion of the court, that the plaintiff is intitled to recover, only for a partial loss.

BRACKENRIDGE J. I consider this as one of those cases, in which it is not of so much importance what the rule is, as that it be settled. I am satisfied with the rule, as it is laid down by the Chief Justice.

Judgment for a partial loss.

The Delaware Insurance Company *against* Delaunie.

1811.

Philadelphia, Saturday, January 5.

The owner of goods chargeable with general average, is personally liable for the amount of his contribution, notwithstanding he has abandoned to the underwriters.

The supercargo of all the shipments *but one* on board a vessel, and having also the management of the vessel, joined with the captain in putting in a claim for the ship and entire cargo, on their being captured and libelled as prize; and upon the acquittal of the particular adventure, he received it subject to the payment of all the costs, expenses, and counsel fees, arising from the capture and trial, which he disbursed out of the proceeds. *Held*, that he was intitled to an allowance of those costs, &c. against the owner, although the owner was in law chargeable only with a part of them.

In cases where interest is not of course, but depends on the conduct of the parties, if the defendant before suit offers to pay as much as is due, and the plaintiff refuses to receive it, the defendant is not liable to pay interest. But if the plaintiff insists on too much, and the defendant offers too little, there is a necessity for the suit, and the defendant must pay interest.

THIS was an action for money had and received, and money paid, laid out and expended, in which the following case was stated for the opinion of the court:

"The *Sampson*, captain *Phippen*, having sailed for the *Havanna*, was taken by a *British* vessel on or about the 1st of *October* 1805, carried into *New Providence*, and there libelled as prize. The amount of the several shipments on board was as follows:

P. Delaunie the defendant - - -	$ 20,082
J. W. Foussat - - - - -	33,915
J. Dabadie - - - - - -	3,766
J. S. Duval - - - - - -	1,905 81
J. Warder and son - - - - -	3,029 40

"The following insurances on vessel, freight, and cargo were made:

1. By the plaintiffs in this action,	
On the ship, owned by *Man* and *Foussat* -	$ 10,000
On goods for *J. Warder* and son - - - -	3,240
for *J. Dabadie* - - - -	3,994
for *J. S. Duval* - - - -	2,020
2. By the *North American* Insurance Company,	
On freight - - - - - -	4,800
3. By private underwriters on freight - -	3,200
To which add the defendant's goods* - - -	20,082
J. W. Foussat's ditto - - - - -	33,915
	81,251

* Insured by the Union Insurance Company, &c. and abandoned to them before this action was brought.

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"The several persons insured, abandoned their respective interests, and, except the defendant, have been paid for the same as for a total loss, and have made full cessions of the property so insured.

"At *New Providence*, the defendant (who was supercargo of all the shipments except that of *J. Warder* and son, and also had the management of the vessel) and the captain of the vessel interposed a claim for the ship and the whole cargo; but the ship and that part of the cargo which belonged to the defendant, and to *J. W. Foussat*, were condemned.

"The shipments of Messrs. *Dabadie* and *Duval* were reserved for further proof, and finally acquitted.

"The shipment of *J. Warder* and son was acquitted in the first instance.

"This shipment was on its acquittal delivered to the defendant, on his paying or securing to be paid all the costs and expenses in consequence of the capture, trial and proceedings. He placed it in the hands of one *Perpal*, as his agent, to dispose of for the purpose aforesaid, and for the benefit of the concerned. *Perpal* made sale of it, and its net proceeds amounted to 1025*l.* 8*s.* 3*d.*, *New Prov.* currency, equal to 2568 dols. 53 cts. Out of this sum Mr. *Perpal*, made the payments mentioned in the annexed account amounting to* 2243 dols. 53 cts. and he paid the balance 325 dols. to the defendant.

"The items in the annexed account are admitted to be right, (as to amount, but without affecting the legal questions submitted to the court) except the charges for sea stores, homeward passages, and expenses from *Port Penn*, amounting to 85 dols.

"On the return of the defendant from *New Providence*, *John W. Foussat* on the 25th *Sept.* 1805, paid to him the sum of 827 dols. 60 cts. as his (*Foussat's*) proportion of general average.

"Judgment is to be entered for the plaintiffs generally, subject to the decision of the court on the following ques-

* This account having been mislaid, an abstract of it could not be obtained. The items paid by *Perpal* were costs of court, counsel fees, and other expenses arising out of the capture and trial.

tions: 1. Whether on such facts as shall be laid before the court, the plaintiffs are intitled to interest. 2. Whether the defendant is intitled to retain the proportion of general average chargeable on the insurances made by the private underwriters, the North America Insurance Company, and by the Union Insurance Company, on the defendant's goods. If when the opinion of the court is given, there shall be any disagreement with respect to the balance due, it shall be settled by *John Donnaldson*."

The additional facts laid before the court, upon the question of interest, were contained in the deposition of *P. B. Duplessis*, who swore that shortly before the bringing of this action, which was in *August* 1806, he had offered in behalf of *Delaunie* to pay the plaintiffs 1411 dollars, and some cents, including Mr. *Foussat's* proportion of average, according to an account made out for the defendant by an accountant; and that he tendered bank bills to that amount to the president of the Delaware Office, and offered to pay to the amount of 500 dollars more, which he had in his pocket of his own money, provided the plaintiffs would come to a settlement, and it should be found that they were intitled to it. But the plaintiffs demanded twenty-six or twenty-seven hundred dollars, and refused to take a cent less.

The sum offered, excluded the general average due by the defendant himself, and the amount of costs and expenses paid out of *Warder and son's* shipment at *New Providence*. It included *Foussat's* average, and the balance received from *Perpal*, deducting the expenses referred to in the case.

The sum demanded, included *Foussat's* proportion of average, the whole amount of *Warder's* shipment (deducting the general average payable by the plaintiffs), and the average due by the defendant himself.

Condy and *Rawle* for the plaintiffs reversed the order of the questions, and argued, 1. That the defendant could not retain, or in other words, claim an allowance for the general average of any parties except those represented by the plaintiffs. The circumstance of his having received *Warder and son's* shipment subject to the payment of the whole, is of no

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importance. He had no authority to receive it at all. He was not the agent for this adventure, nor of the plaintiffs. Before abandonment their goods were liable only for their own debt; and it is clear that after an abandonment to several underwriters, they are not to be considered as joint owners, so that either they or their property can be held responsible for each other's obligations. *United Insurance Company* v. *Scott* (*a*), *Holmes* v. *The United Insurance Company* (*b*). It was not the duty of the supercargo to interpose a claim for *Warder and son.* The captain alone had authority to do this, and to receive the adventure acquitted, in consequence of there not being a special agent. Any agreement by the defendant to subject *Warder and son's* goods to costs and charges to which they were not legally exposed, can therefore have no effect. They were bound to pay at the utmost, only a proportion of the costs. Counsel fees are not costs. Indeed, unless there is something grossly fraudulent in the case, the claimant is not exposed even to the costs of court, upon acquittal; and it does not appear that the court of Admiralty thought there was any thing of that sort in the claim for the *Warders*, or that they restored the goods subject to costs. 1 *Rob. Adm. Rep. introd.* 5. 6. But how can the defendant avoid refunding what has been paid for his proportion of average? There is no doubt that upon general principles he is liable in this action to the plaintiffs, whose goods, abandoned to them by the *Warders*, have paid the whole. *Birkley* v. *Presgrave.* (*c*) But his having abandoned his own goods to underwriters, is supposed to create an exception. Certainly we are not compelled to look to the underwriters; we are not bound to try his action upon the policy, nor in point of law can we do it. *Non constat* that he has any claim on them, although we have a very good one on him. Nor are we compelled to look to the goods saved. If general average is due by goods, the law raises a promise by the owner, which is the foundation of a personal suit.

2. As to interest. The tender was 1411 dollars and some cents; and if it had been relied on, the money should have been brought into court; 6 *Bac. Abr.* 462. *H. Tender;* for

(*a*) 1 *Johns.* 106. (*b*) 2 *Johns. Ca.* 329. (*c*) 1 *East.* 229.

where a debt is not discharged by a tender, the party must shew himself still ready. But it was clearly too small, by excluding the defendant's proportion of average, and by including sea stores and passage money home; and if the plaintiffs are intitled to more than the sum tendered, they ought to have interest upon the whole from the commencement of the action.

Lewis for the defendant. 1. The claim saved the goods of *Warder and son*, for without it there can be no doubt they would have been condemned; and the defendant had a right to make it, from his general character of supercargo for all the rest, and also from having the management of the vessel. When the goods were acquitted and restored in pursuance of the claim, he took them *cum onere*. The case states it. It states the payment to have been the condition of the delivery; in effect, it states that only the balance beyond the charges was delivered to him. How then can he be charged with more? If however he was wrong in thus receiving the goods, the form of action affirms his acts. *Bull. N. P.* 128., *Eastwick* v. *Hugg*. (*a*) But he was right. He joined the captain in a claim for the whole, and had a lien upon every part of the cargo for all the expenses of the trial. He either gave security, or obtained it, for all the costs, or he could not have made a claim. In either case, he was intitled to apply *Warder's* shipment to pay the whole. As to his own proportion of the average, since he has abandoned to the underwriters, they and not he ought to answer the contribution. General average gives a lien. It is payable by the goods, unless they are accepted subject to the lien, in which case a promise may be implied, and an action may be sustained upon it. But unless there is such an acceptance, there is nothing from which the law can raise a promise. The underwriter, to whom the goods are abandoned, must see to the contribution to which they are subject. He takes the goods, and he gets the benefit of the average.

2. As to interest. We do not rely upon the tender and refusal. This is not the case of a contract carrying interest

(*a*) 1 *Dall.* 228.

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expressly or from its nature. Interest here must be in the nature of damages for improperly withholding the plaintiff's money; and then the only question is, has he acted properly, has he been willing to settle the account upon just principles, and have the plaintiffs refused it? There can be no doubt of it. The plaintiffs refused to come to a settlement, but demanded payment of their whole claim, and would not look at any settlement but their own. Under such circumstances they are not intitled to interest.

TILGHMAN C. J. delivered the court's opinion.

Two questions are submitted to the court upon the case stated. 1. Whether the defendant is intitled to retain the proportion of general average, chargeable on the insurances made by the private underwriters, by the North America Insurance Company, and by the Union Insurance Company on the defendant's goods? 2. Whether on the facts laid before the court, the plaintiffs are intitled to interest?

The goods of *Warder and son*, in whose place the plaintiffs stand, were acquitted; but they were afterwards sold by the defendant's agent, and the proceeds applied to the payment of sundry costs, charges and expenses, which constitute the subject of general average. Mr. *Foussat*, one of the persons liable to contribute to this average, has paid his proportion to the defendant. There is no doubt therefore but the defendant is answerable to the plaintiffs for the amount received of *Foussat*. Nor do I think there is any doubt of his being answerable for the average originally due from himself, on account of his own goods. It is no answer, to say, that he has abandoned to his underwriters, and the plaintiffs must look to them. The defendant was originally answerable to *Warder and son*, and consequently to the plaintiffs who represent them, for the amount of his contribution. It is conceded that an action at law would have lain against him, according to the decision in *Birkley* v. *Presgrave*. 1 *East* 220. Being once answerable, it was not in his power to throw off that responsibility, by any act of his own. His abandonment was his own voluntary act. He therefore remains answerable to the plaintiffs, and must look to the underwriters for his indemnity.

It is next to be considered, whether the defendant may retain on account of the contributions due from other persons. The plaintiffs say he cannot, because he was no agent of *Warder's*, and had no right to sell their goods, and apply their money without their consent. On the other hand the defendant contends, that from the nature of the case, having joined the captain in the claim and defence of vessel and cargo, he had a lien on every part of the cargo for the amount of all the expenses, and that the court of Admiralty would not liberate any of the cargo, till the whole costs were paid. This does not seem to be denied by the plaintiffs' counsel, so far as concerns the *costs* of the court; but they say that these costs bear a small proportion to the fees paid to counsel &c., which are not properly costs of suit. There will be no occasion for entering into this question, because it appears, from the state of the case, that the goods of *Warder and son*, were only delivered to the defendant, "on his paying, "or securing to be paid, all the costs and expenses, in "consequence of the capture, trial and proceedings." Who it was that withheld the goods, or exacted this condition, does not appear. But it cannot be said that the defendant received for the use of the plaintiffs, that part of the money, which he was obliged to apply to other uses, by the condition annexed to the delivery of the goods. The defendant had therefore a right to retain the full amount of all costs and expenses, except that part which was due from himself.

2. As to interest. The defendant is not held to the same strictness in resisting the claim to interest, as he would be on a plea of tender and refusal. Interest, in actions like the present, is not a matter of course, but depends on the conduct of the parties. If the defendant has delayed payment improperly, he is chargeable with interest. On the other hand, the plaintiff may forfeit his claim to interest, by unreasonable behaviour. If the defendant offers to pay as much as in justice he ought, and the plaintiff refuses to receive it, and brings an action, it would be wrong that the defendant should pay full interest, after being driven to the expense of defending himself against an unjust suit. But in the present case, the fault does not seem to lie altogether on

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either side. The plaintiffs insisted on too much, and the defendant offered too little. There was a necessity therefore for a suit. That being the case, and there being no reason to suppose that the defendant has not made use of the money, we think he should be chargeable with interest.

Judgment for plaintiffs.

Philadelphia, Saturday, January 5.

The act of frauds and perjuries of the state of *Pennsylvania*, does not prevent a declaration of trust from being made by parol. Hence in an ejectment by the devisees of *A* against *B*, it is competent to give parol evidence of the declarations of *A* that the land she had purchased in her own name, was bought for the use of *B*, with money in which her husband had given her only a life estate, by his will, and had devised it to *B* after her death.

Lessee of GERMAN and others *against* GABBALD.

THIS case came before the court upon a point reserved at the trial at *Nisi Prius* in *November* last, by Judge *Brackenridge*.

Jonathan Beere by his last will devised to his wife *Mary*, two tenements and lots of ground for the term of her natural life, with liberty to sell them at any time, if she should think proper; and in case of sale the purchase money was to be put out on good security, and his wife during her life was to enjoy the interest. After the death of his wife, he gave to his sons *John*, *James*, and *Jonathan*, every thing which he had given to his wife for life, to hold to them, or the survivors of them, their heirs and assigns, share and share alike. *James* died before the testator. After the testator's death, the widow sold the premises in the will, and bought a house and lot, the premises in the ejectment, for which she took a deed *in her own name*, and then devised them to her two grand-daughters the children of *John*, who were the lessors of the plaintiff.

The defendant claimed under *Jonathan* the brother of *John*, and offered parol evidence to prove that the premises in question were purchased for the use of *Jonathan*, with one half of the identical money for which *Mary Beere* had sold the property devised to her for life by her husband, and that the other half was appropriated to pay the debts of *John;* and that she had repeatedly declared that she had done this in pursuance of her husband's will.

The evidence was opposed by the plaintiff's counsel; but the court admitted it, reserving the point.

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C. J. Ingersoll for the plaintiff. There is great difficulty in admitting parol proof to aid the court to follow money into land. It tends uniformly to perjury. Chancery does it only where the fact of laying out the money has been admitted in the answer of the person who has done it. *Lane* v. *Dighton*. (*a*) But to prove that fact, and also to trace the money, parol evidence has never been received. It is against our act of frauds. In *England* the admission of parol evidence to establish a trust by implication, has not been extended beyond the cases excepted in the 8th section of the statute. Lord *Hardwicke* has confined them to two; where an estate has been purchased in the name of one person, and the money has been paid by another; or where a trust is declared only as to part, and nothing said as to the rest. *Lloyd* v. *Spillet*. (*b*) 2 *Fonbl.* 121. But our act contains no exception. The first section defeats every grant or assignment of interest in lands, except by deed or note in writing; and the admission of parol proof in this case, went to shew that an interest was conveyed to *Jonathan* by the deed to his mother, which in fact was to establish an interest in lands, not only without, but against a deed.

Hopkinson contra. The first section of our act of frauds, 1 *St. Laws* 640., is an exact copy of the first three of 29 *Car.* 2., except that it omits copyholds, a tenure we have never adopted; and unless one of those three sections has been held to require writing for the establishment of a trust estate, it is not required by our act, because the act contains no provision as to writing except what is mentioned in the first section. Now it is perfectly clear upon examination, that the provision as to trusts grows out of certain parts of the *English* statute which we have not adopted, the 7th and 8th sections. It is true that our act does not contain any exception; but then it does not contain the general rule. The 7th sect. of 29 *Car.* 2. *c.* 3. requires that all declarations of trusts shall be in writing, and then the 8th section excepts the cases mentioned by lord *Hardwicke*, and no doubt some others. But there is nothing in the act of assembly to pre-

(*a*) *Ambler* 413. (*b*) 2 *Atk.* 148.

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vent a declaration of trust from being by parol. It extends only to legal estates. If however the plaintiffs' argument as to the first section is sound, still we must go as far as the words of that section, which permit a transmission of an interest in lands by *operation of law* without writing, and which therefore embrace this case; for Mrs. *Beere* having purchased the premises with *Jonathan's* money, it was a resulting trust for him by operation of law. *Gregory's Lessee* v. *Setter* (*a*) is in point. Evidence of Mrs. *Gregory's* declaration that she had purchased the premises with her deceased husband's money, part of which belonged to her children, and that she had made the purchase for their use, was admitted to establish a trust in the children. *Thompson's Lessee* v. *White* (*b*) is also a strong authority. Surely the declarations of Mrs. *Beere* were evidence against persons claiming under her will.

TILGHMAN C. J. after stating the facts, delivered his opinion as follows:

The objection to the parol evidence is founded on our act for prevention of frauds and perjuries. This act is in some parts copied from the *English* statute of frauds and perjuries, but the likeness does not hold throughout. The first section of our act contains the first three sections of the *English* statute, and so far as concerns the present question, enacts that no estates or interests, either of freehold, or term for years, of, or in, any messuages, lands &c., shall be assigned, granted, or surrendered unless by deed or note in writing, signed by the parties so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by *act* and *operation of law*. This provision seems to apply rather to legal estates than to trusts, and it was so considered by the *English* legislature, for they have added a provision with respect to trusts in the 7th and 8th sections of their statute, which is entirely omitted in our act of assembly. By the 7th section of the statute, all declarations or creations of trusts, or confidences of any lands, shall be manifested and proved by some writing signed by the party who is intitled to create such trust by his last will in writing, or else they shall be void; but the 8th section declares, that where the trust arises by implication or

(*a*) 1 *Dall.* 193. (*b*) 1 *Dall.* 424.

construction of law, or is transferred or extinguished by act or operation of law, it shall be of the same effect as if the statute had not been made. Now if our act does not comprehend the case of trusts, there is an end of the question, because there will be nothing to prevent parol proof of any thing by which a trust may be inferred. But supposing it to be as comprehensive as the *English* statute, still parol evidence may be given to establish a trust, which arises by implication of law. In the case of *Lloyd et al.* v. *Spiller et al.* 2 *Atk.* 148., lord *Hardwicke* says, that where an estate is purchased in the name of one person, with the money of another, or in cases of fraud, and where transactions have been carried on *mala fide*, there is a resulting trust by operation of law. In the present case, the money with which the house was purchased was not the money of *Mary Beere;* she had but an interest in it for life, and after her death it belonged to her son. If she acted honestly, and meant the house to go, as the money would have gone by her husband's will, a trust resulted for her son; but if she meant to divert the money from its proper channel, and convert the property to her own use, she was guilty of a fraud, and in that case also, according to lord *Hardwicke's* opinion, there was a resulting trust. Whatever were her intentions, the fact of her having used the money of another person might be proved by her confessions, which certainly were evidence against herself, and those who claimed under her by virtue of her will. Those confessions are not to be considered as a parol declaration of a trust by her, but as evidence of a fact, by virtue of which a trust resulted by operation of law. The case cited by the defendant's counsel from 1 *Dall.* 193., *Gregory's Lessee* v. *Setter*, determined in this court, is directly in point. There parol evidence was admitted, to prove a woman's declarations, that she had purchased a house, and taken the deed in her own name, with the money of her deceased husband, part of which belonged to her children. I therefore consider the law to be well settled on the point which was reserved, and am clearly of opinion that the evidence was properly admitted.

YEATES J. concurred.

BRACKENRIDGE J. of the same opinion.

Judgment for defendant.

3b 306
1s r589
5s r403
5s r449
7s r124
9s r 22
9s r248
12s r181
17s r454
1r 434
3r 410
3r 411
3w 249
4w 312
5ws510
8ws 57
1 365
2 46
2 157
2 460
4 200
5 37
6 326
6 400
6 474
7 328
10 430
12 395
13 110
21 268
35 457
35 458
66 304

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Philadelphia, Saturday, January *5.*

A plaintiff who after the commencement of the suit, has made a voluntary assignment of all his property to creditors, and has also executed a release to the assignees, of all his interest in the money which may be recovered in the action, is a competent witness in the cause, provided all the costs are paid before he is sworn.

WILLIAM and JAMES STEELE *against* the PHŒNIX INSURANCE COMPANY.

THIS cause came before the court upon a point reserved by his honour Judge *Brackenridge* at the trial in *October* last.

It was an action upon a policy of insurance to recover a total loss, which the defendants resisted upon the ground of concealment. The cause was first tried before the Chief Justice, where a verdict was found for the plaintiffs, which was afterwards set aside as being against the weight of evidence. Upon the second trial, the plaintiffs' counsel shewed to the court that the suit was brought to *March* term 1805; that on the third of *June* following, the plaintiffs assigned all their property to assignees for the benefit of creditors, from whom they received a release in *November* 1805; and that on the morning of the trial, a paper had been filed in court, declaring that the suit was for the use of the assignees, by whom, all the costs, including the whole costs of trial, were then paid. They produced also a release from both the plaintiffs to the surviving assignees, dated the day of the trial, of all money to be recovered on the policy in question, for the use and benefit of the creditors mentioned in the assignment of the 3d *June* 1805; and they then offered *William Steele*, one of the plaintiffs, as a witness in the cause.

The witness was objected to; but Judge *Brackenridge* admitted him, reserving the point for consideration in bank.

Levy and *Ingersoll* for the plaintiffs. There is no difficulty in the case, unless the court will now overrule a series of decisions. In *Calhoun* v. *The Insurance Company of Pennsylvania*, the plaintiff, having no interest, and the costs being paid, was admitted as a witness by the late Judge *Smith*, who said it had frequently been done. In *Kerr for the use of Taylor et al.* v. *Hawthorn*, *Taylor*, who was merely a trustee, was admitted, the costs being paid. In *Vansant* v. *Boileau* (*a*) the only objection to the admission of an executor, who was plaintiff in a feigned issue, was his liability for costs. And

(*a*) 1 *Binn.* 444.

in *M'Ewen* v. *Gibbs*, (*a*) which is in point, it appearing that the assignees of the plaintiff carried on the suit, and had entered into security for costs, and that the plaintiff was a certificated bankrupt, the court upon the authority of a former decision, directed him to be sworn. Upon what principle can a plaintiff circumstanced like *William Steele*, be held incompetent? The most general, and by far the most reasonable objection to competency, arises from interest. He had no interest whatever in the suit. He could neither gain nor lose. The benefit of the verdict was transferred to his assignees by the general assignment, recently confirmed, and extended to any possible surplus by this release; and the penalty of his failure in the cause, the payment of costs, was removed by the unconditional payment of them before he was sworn. In what respect does the case differ from a suit by a nominal plaintiff, for instance, the assignor of a chose in action, who is a mere name on the record, whom the court will not suffer to discontinue, *M'Cullum* v. *Cox*, (*b*) and who has been uniformly admitted upon the payment of costs. In fact it is his case precisely; and the court seeing who the real party in interest was, would have gone so far as to compel the assignees by attachment to pay the costs, in case of necessity. Is it contended that he was interested at the commencement of the suit, and that no subsequent event should restore his competency? What is more common than for persons to release an obvious interest at the very moment they are going to be sworn? Nay further, if a release be tendered, though it be not accepted, the witness is competent. *Peake's Ev.* 166. It is of no importance what his interest has been, if it be removed before he gives evidence. Can a distinction be taken between the effect of a voluntary assignment like this, and an assignment by a bankrupt? For there is no doubt that in *England*, as well as in this state, a certificated bankrupt, who has released his interest in the surplus of his estate, is a good witness. *Butler* v. *Cooke*. (*c*) As to this point there can be no difference. The principle is the removal of interest, which is done with the same effect by either kind of assignment. Is there any rule of law then, which precludes a

(*a*) 4 *Dall.* 137. (*b*) 1 *Dall.* 139. (*c*) *Comp.* 70.

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plaintiff from being a witness, merely because he is plaintiff? No such rule can be shewn. It is negatived by a decision in our own state; *M'Ewen* v. *Gibbs*. *Peake* states it only as a *general* rule, *Peake's Ev.* 157. And inasmuch as there can be no doubt that the real party in interest might, if there were a court of equity, inforce his equitable right against the defendant, without introducing the name of the legal plaintiff, in which case he certainly might have the testimony of the latter, it would be a severe rule upon equitable plaintiffs, if the necessary introduction of a name should deprive them of important testimony. In fact, no objection can be urged against the admission of such a witness, except what is founded upon suggestions of possible fraud, perjury, colourable assignments and the like, which either go to the credit of the witness when sworn, or suppose a very different case from the present. If there is fraud, there must be a remaining interest. If there is a temptation to commit perjury, the witness must be observed closely by the jury. If the assignment is fictitious, the witness is still the real plaintiff. All these are solid objections in particular cases; but they have never been made the foundation of such a general rule as will exclude a plaintiff, who has honestly parted with all his interest by a general assignment in satisfaction of his debts, and is clear of liability to costs when he comes to the book.

Rawle contrà. What has passed at *Nisi Prius*, or has been ruled without argument and consideration, should have but little weight. Very dangerous innovations in the law of evidence, have been made in *Pennsylvania* since the revolution. No other country regulated by the same code, has gone as far; and if this court cannot overthrow past decisions, still, if they trench too deeply upon the fundamental rules of evidence, at least the court may limit their application and authority to cases of precisely the same kind. There has never yet been an instance in which a plaintiff who has made a voluntary assignment after action brought, has been permitted to give evidence in the cause; and this is sufficient to open the case for the application of general principles. The point has probably never occurred before; perhaps because under such circumstances a plaintiff has never before been

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offered to testify; and the inevitable tendency to injustice which such an admission has, is quite sufficient to justify the court in excluding the plaintiff in the suit, under all circumstances whatever. The system of evidence adopted by the common law, is an admirable body of rules, all of which are calculated, in the first place to aid in attaining the truth, by making a most judicious selection of the channels through which it shall be sought, and in the next place to preserve the peace and integrity of society, by excluding either the witness or the evidence in cases where its admission would be followed by a sacrifice of those important interests. The law of evidence cannot be justly estimated without contemplating it under both of these aspects. Under both, the influence of principles of public policy may be distinctly recognised in a variety of what at first may strike as artificial rules, without any better authority than precedent, but which upon close examination appear to be deeply laid in a knowledge of mankind, and in a regard for the great interests of the community. Hence an attorney cannot disclose the communications of his client. Husband and wife cannot testify either for or against each other. A mother cannot bastardize her issue by proving non-access of her husband. *Peake* 183. A man who apprehends himself to be interested, cannot, whatever may be the fact, be heard as a witness. *M'Veaugh* v. *Goods*. (*a*) One who lays a wager to disqualify himself, shall still be competent. And a party to negotiable paper shall not be heard to impeach it. *Coleman* v. *Wise* (*b*), *Allen* v. *Holkins* (*c*), *Churchill* v. *Suter* (*d*), *Baring* v. *Shippen* (*e*). These are all cases in which the principle of interest does not shew itself; but on the contrary a motive of policy to prevent those sacrifices of professional honour, of domestic peace, and of truth, which most generally would follow from permitting such parties to testify, or such testimony to be given. It is no answer to say, that when the court discover the fraud, they may reject the witness. The difficulty of detecting the fraud, or rather the universal tendency to fraud which the practice of admitting the witness has, is a foundation for a general rule of exclusion. What principle of public policy

(*a*) 1 *Dall.* 62. (*c*) 1 *Day.* 17. (*e*) 2 *Binn.* 165.
(*b*) 2 *Johns.* 165. (*d*) 4 *Mass. Rep.* 161.

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applies to any of these cases, which does not apply to the case of a plaintiff like the present? He institutes the action with a strong sense of his personal interest in it; he finds in the progress of the cause, perhaps upon the first trial, where is the pinch, and voluntarily transfers his interest to a third person, under some covert agreement which certainly a court of law cannot detect, in order to meet the difficulty. This is not only possible, but bad men will often do it, and with impunity. Why should a man be prohibited from disqualifying himself by a wager, and yet be permitted to sell his interest, and make himself a witness pending the action? If the law treats him like a criminal, and takes his estate from him against his will, as in the case of bankruptcy, there is less reason to suspect, because there is less opportunity to practise, fraud; and hence it is probable the courts in *Pennsylvania* have permitted such a plaintiff to give evidence. But in *England* no instance can be shewn of any case in which the plaintiff has been received. In *M'Clenachan* v. *Scott*, cited in a note to *Field* v. *Biddle*, (*a*) president *Biddle* told me that he intended to lay down the rule, so as to limit the competency of the plaintiff to cases of bankruptcy, and to exclude the case of a voluntary assignment; but the decision was rendered unnecessary, by the verdict. In the case of *Cogbill* v. *Cogbill* (*b*) the Supreme Court of appeals in *Virginia* have gone the whole length of my argument, by deciding that a party appellee could not be received as a witness for his co-appellees, either upon releasing to them his interest, or upon his or their depositing a sum sufficient to pay costs; and judge *Roane* conceives the case of *The King* v. *The Governors of St. Mary Magdalen* (*c*) to establish the position, that if a person is liable for costs in the first instance as a *party*, (even though he be only a trustee, and is to be reimbursed such costs out of a particular fund) he is rendered incompetent, and can *by no act* be qualified as a witness. The rule contended for is moreover unequal in the highest degree, in its operation. If the plaintiff knows any thing of importance to the defendant, the latter has no means of applying to the conscience of his opponent, for a disclosure, and there-

(*a*) 2 *Dall.* 172. (*b*) 2 *Hen. & Mum*, 467. (*c*) 3 *East.* 7.

fore, he cannot obtain it; it is only when it will benefit the plaintiff himself, or rather the assignee of the plaintiff, that the court will hear of it. This circumstance should be considered in connexion with the others in estimating the great danger of admitting the witness, and the necessity of interposing a general rule to exclude all witnesses who have ever stood in the relation of party in the cause.

TILGHMAN C. J. If *William Steele* was not a competent witness, it must be, either because he was interested at the time the action was commenced, or because he was interested at the time he was offered as a witness, or because he was a party to the suit, or because it is against the principles of sound policy to admit him. All the objections which have been urged in the argument, may be reduced to one of these four heads.

1. The reason that interest renders a witness incompetent, is, that it may be supposed to have an influence on his mind, at the time that he gives his testimony. That is the time therefore to which we are to look. If the deposition of a witness is taken, while he is interested, and he becomes disinterested before the trial, the deposition cannot be read. On the other hand, if a witness comes to the bar interested, and devests himself at the bar of his interest, by a release, he is a good witness. So far therefore as an objection arises from interest, it is of no consequence what *Steele's* situation was at the commencement of the action.

2. Whether he was interested at the time he gave his testimony, is a matter of fact. It appears to me that he was not, because the suit was at that time carried on by the assignees for the use of his creditors, who paid all the costs, and he had devested himself of all advantage, which might possibly arise to him from any surplus of his estate, by a release.

3. It is insisted on by the defendants as a peremptory rule of law, that the plaintiff in the action cannot be a witness. Such a rule has not been proved. It is true indeed, that no instance has been shewn of the plaintiff's being received as a witness in an action *at law* in *England*. The fact is, that in almost every instance, the plaintiff is interested either in the subject of the suit, or in the costs, and therefore the con-

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clusion may have been drawn without sufficient reflection, that in no case can he be a witness. The reason of the law is the life of the law. Now what good reason is there, why a man's testimony should be excluded, merely because his name is placed on the record as a party to a suit, in which he has no manner of interest. The reason for admitting such evidence is much stronger *here than* in *England*. In this state we have no court of Chancery, and therefore the assignee of a chose in action is compelled to bring his action in the name of the assignor; whereas in *England* he may file a bill in equity, in his own name, and thus in some instances obviate the objection arising from the assignor being plaintiff on the record, in case he wants to make use of his testimony. " Our courts take notice of the equitable owner, although the suit is not brought in his name. In the case of *M'Cullum* v. *Coxe*, 1 *Dall.* 139., the plaintiff, who had assigned the cause of action to another person, wanted to discontinue, but the court would not permit him. It is the experience of every day, that the assignee brings an action in the name of the assignor, without consulting or even letting him know of it; and in such case, we consider the assignor as out of the question, and should issue an attachment for costs against the person for whose use the suit is brought, in case of a judgment for the defendant. We have direct authority in our own courts against the rule, that the plaintiff cannot be a witness. In *M'Ewen* v. *Gibbs*, 4 *Dall.* 137., it was decided, that the plaintiff being a bankrupt, who had obtained his certificate, and released his interest in the surplus, might be a witness. It does not appear by the report of this case, whether the plaintiff became a bankrupt before or after the action was brought; but I can see no good reason for a distinction between these cases, provided the interest arising from liability to costs is removed in the latter case. And indeed we are not without *authority*, when the bankruptcy takes place after the commencement of the action; for that was the very point determined by president *Biddle* in *M'Clenachan* v. *Scott*, 2 *Dall.* 172. *note*. It has been observed by Mr. *Rawle*, that president *Biddle* made a distinction between an assignment in case of bankruptcy, and a voluntary assignment. What ground there is for such a distinction, may more

properly be considered under the fourth head, the supposed *impolicy* of admitting this kind of evidence.

4. When we talk of altering the law of evidence from motives of policy, it approaches so near to the language of legislation, that to authorize it, the policy must be manifest, and the mischief to be avoided, great. The general rule is, that every person not infamous or interested, is a competent witness. To this there have been exceptions, perhaps as ancient as the rule. Husband and wife shall not testify for or against each other. An attorney at law shall not betray the confidence of his client. There is another exception, the birth of modern times, introduced no doubt from motives of policy. A man shall not be permitted to destroy by *his own* testimony, a negotiable instrument to which he has given credit by his signature. But this last exception has not been carried without great opposition from very high authority. Indeed so fluctuating have been the opinions of judges in *England*, that the point can hardly be considered as yet established in that country, although with us it is fixed. Now the difference on this question, did not arise from any difference of opinion concerning the policy of supporting the credit of commercial paper, but on the *right* of the *court* to alter the law of evidence on the ground of policy. Let us now consider the danger, which it is said, will arise from admitting the testimony in the case before the court. It is supposed that bad men will transfer their rights of action to third persons, in order to open the way for their own testimony. This objection applies equally to assignments made *before* or *after* the commencement of the action, and it applies also, to cases over which the court has no control, such as sales of rights to land, and assignments of bonds under our act of assembly, in both which cases, the vendors may undoubtedly be witnesses, if they are devested of all interest. It will be remembered too, that before the witness is admitted, he must satisfy the *court*, that he has been guilty of no collusion; that he has devested himself of every particle of interest; that he is neither to gain nor lose by the event of the suit; and to these points he must answer upon oath. If he really is entirely disinterested, I see no great danger from the circumstance of his having been *once* interested.

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And after all the jury will judge of his credibility. How can the case before us, be distinguished from that of a certificated bankrupt? It is said, that the assignment of the bankrupt was compelled by law, because in the eye of the law he was *criminal*. The fact is, that nineteen commissions in twenty are sued out at the request of the bankrupt. But if it be objected that this is not the supposition of the law, I ask whether a man's having acted criminally is a recommendation of his evidence. I take it, that the true reason of the bankrupt's being received as a witness, is, that he has no longer any interest in the thing in controversy; and this reason applies equally to voluntary assignments. Where a man assigns all his property for the benefit of all his creditors, there is in general no reason to suspect collusion; but where he assigns a particular thing to an individual, (especially pending the action) and then comes forward to make out the case by his own testimony, he should be watched narrowly. In all such cases, the court will admit or reject the testimony, according to their conviction of the assignment being a *bona fide* transaction or not. In the case before us, there was no suspicion of fraud.

I am therefore satisfied, that the evidence was properly admitted.

YEATES J. Upon the point reserved in this case, it has been urged by the defendants' counsel, that *William Steele* ought not to have been admitted as a witness; not only on the ground of mere interest, but on the principles of sound extended policy.

The general rule is, that a party shall not be sworn in his own cause. He is interested in the event, and is therefore excluded. But a nominal plaintiff can only be rejected, on the ground of his liability to costs. The court will take judicial notice, who are the real parties, as in the case of *M'Cullum* v. *Coxe*, 1 *Dall.* 139., and an executor may be sworn in a cause relating to the will, where he is not a residuary legatee, because he is merely a trustee. *Gilb. Law Evid.* 120.

The cases on this head were very fully examined in the cause of *John Field* and *John Bernard* for the use of *Oxley & Hancock* v. *James Biddle* esq., tried in bank, *April* term

1792. It is reported in 2 *Dall.* 171., but I have a fuller note of the court's opinion on the point of evidence. There the court expressed themselves thus: "We feel a strong repug- "nance against the testimony offered; our present inclina- "tion is against the receiving of *Field* as a witness. We "know of no case in the books, or by our practice, where a "plaintiff has been admitted a witness to substantiate his de- "mand to a jury. This point was much contested in an ac- "tion of covenant tried at *York Nisi Prius* in *May* 1791, be- "tween the executors of *Andrew Cochran* plaintiffs, and the "executors of *William Cochran* defendants. There *James* "*M'Kissom*, one of the plaintiffs, was offered as a witness, "and it appeared that he had no part of the residue devised "to him by the testator, and the plaintiffs offered to lodge "the costs in court; but he was rejected. The plaintiffs here "might have assigned the bond to *Oxley* and *Hancock*, if "they chose it, and thereby made either of themselves wit- "nesses. As they have not done so, the present matter "stands precisely in the same situation, as a factor selling "goods for his principal, and bringing a suit for the "money in his own name, where he is repelled from "giving testimony. But if the suit had been brought in the "name of his constituent, the factor would be a compentent "witness, though he got 1*s.* in the pound commissions on "the sale. 1 *Atky.* 248., 3 *Wil.* 40. However, if the plaintiffs' "counsel are willing to run the risk, we will not prevent "Mr. *Field* from giving his testimony; but if he is admitted, "and a verdict should pass for the plaintiffs, and upon a more "full consideration we shall retain our present opinion, a "new trial will be awarded without costs." Mr. *Field* was accordingly admitted as a witness; but the jury having found a verdict for the defendant, the question was not again stirred.

That case was dissimilar in one striking particular, from the one now before the court. *Field* was the agent of merchants beyond sea. If he, or some friend in his behalf, had lodged the costs of the action with the prothonotary of this court, a verdict for the plaintiffs would necessarily have effected a return of the money paid; and consequently Mr. *Field* was immediately interested in the event of the suit. But here the assignees of *William* and *James Steele* paid the full costs out of their own pockets, and whether a verdict

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passed for the plaintiffs or defendants, they could neither gain nor lose in a pecuniary point of view. I cannot conceive the smallest *scintilla* of interest in *William Steele*. It is true the action was at first instituted to *March* term 1805 for the benefit of the partners; but they had become insolvent, and within three months afterwards, had assigned over all their property real and personal for the benefit of their creditors in general *pro rata*. Their creditors executed releases to them in *November* following, and previous to the offer of the testimony, they had released to their assignees all moneys which might be recovered under this policy of insurance. After the execution of the assignment in *June* 1805, they had no longer any control over this action; it was wholly in the option of their assignees, whether they would proceed in the suit, or desist therefrom.

On the score of sound policy, I cannot distinguish between a voluntary assignment to creditors in general in cases of insolvency, and the compulsory assignment produced by the statutes of bankruptcy. A certificated bankrupt may be a witness in *England* upon releasing the fund. *Peake's Evid.* 168. And the same point has been determined in this state, in several cases, where the costs have been paid, or security given for them. It is much to be wished, that more frequent instances would occur of early fair and honorable surrenders of the property of unfortunate merchants, who have failed in trade from a variety of causes, to which mercantile enterprises are naturally subjected. If we had a court of equity, either party according to the cases cited by the plaintiffs, might have compelled *Steele* to make a full disclosure upon oath, of all the circumstances attending this transaction. It is no solid objection to assert, that by introducing the original party as a witness, a door is thrown open to fraudulent practices, wherein a secret interest might be secured to the failing debtor. The same observation is applicable to a vendor of lands, who conveys without covenants of warranty; or where there are such covenants, on the vendee executing a release at the bar; and yet in such cases, it is matter of daily practice to admit such witnesses to be sworn. Besides, there can be no doubt, that where a voluntary assignment was made to appear clearly to the court to be collusive, they would in-

terpose and reject the witness; and where there occurred any difficulty as to the fact, they would instruct the jury to pay no regard to the testimony of the witness, if they were satisfied, that the assignment was merely colourable, with an intention to defraud creditors. The jury must necessarily judge of his credit.

Upon the whole matter I am of opinion, that the testimony of *William Steele* was properly admitted to go to the jury, and that judgment be entered for the plaintiffs.

BRACKENRIDGE J. At the time the point was reserved by me, I could see no satisfactory reason why the witness should not be heard; and I am now perfectly satisfied that he was competent.

Judgment for plaintiffs.

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36 317
15s 159
45 70

GRIFFITH surviving partner of NICKLIN *against* WILLING and others.

Philadelphia, Saturday, January 5.

THIS was an action of account render, in which the declaration contained three counts, the *first* charging the defendants as bailiffs, the *second* as receivers, and the *third* as bailiffs and receivers. The pleas were *ne unques bailiff or receiver*, and fully accounted; and the cause went to trial under an agreement by counsel, that the jury should not only decide the issues, but the amount, if any, due from the defendants.

Joint partners in a mercantile adventure may have account render against each other by the common law; *tenants in common*, by the 27th section of 4 *Ann.* c. 16., which section has been adopted in *Pennsylvania.*

The case involved an immense mass of evidence, which is of no importance to the present question, whether *account render* was the proper form of action. So far as it respects this point, it is only necessary to state, that the plaintiff and the defendants were concerned together in a large adventure to *South America*, the funds of which, belonging to them in equal moieties, were sent out in the *Canton*, a ship belonging to two of the defendants, and the *America*, a ship belong-

To justify a new trial, the mistake of the jury in law or fact must be plain, or the verdict must be decidedly against the evidence. It is not enough that the court did not look upon the evidence in the same light with the jury, or that they would not have found such a verdict themselves.

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ing to the plaintiff's house, sailed in company, to bring back the plaintiff's proportion of the proceeds. They had made a contract with a *Spaniard*, that the shipment should be paid for at *Buenos Ayres* at a certain advance; and they expected that an equal amount of the returns would be furnished to each ship. The plaintiff's proportion of goods was taken out in the *Canton*, free of freight; but each party made separate insurances on their interest in the goods, and on the ship, and each fitted out and supported their ships at their separate expense. The whole adventure was under the care of two joint supercargoes, who were instructed in case the cargo could not lawfully be landed, to return to the *United States* without breaking bulk; if it should be landed and paid for, they were to ship one half of the proceeds on board the *Canton* for the defendants, and the other half on board the *America* for *Nicklin* and *Griffith;* and as some event might occur which was not provided for in the instructions, the supercargoes were informed that the parties relied on their prudence, vigilance and zeal, for the full completion of the plan. The cargo was not accepted by the *Spanish* house upon the original terms; and this case not being provided for in the instructions, the supercargoes thought it best to deliver it over to the house as consignees to sell on commission. Thirty thousand hides, a part of the sales, were shipped on board the *Canton* to the address of *Willings* and *Francis*, who sent them by the same vessel to *Amsterdam*, where they were sold; and after a long delay 20,000 hides were shipped in the *America* for *Nicklin* and *Griffith*. The object of the action was to recover the plaintiff's proportion of the 30,000 hides shipped by the *Canton*, upon the ground that they were to a certain extent jointly interested therein.

The Chief Justice charged the jury, that the plaintiff's claim rested upon the principle of his being jointly interested with the defendants in the cargo of the *Canton* from *Buenos Ayres* to *Philadelphia*, and if he was right in that, of which they would judge, the action would lie. The jury found for the plaintiff; and now upon a motion for a new trial, as well upon the merits as upon the propriety of the action,

Hare and *Lewis* for the defendants, contended upon the

latter point, 1. That this action could not be sustained at common law, because there was no privity in deed between the parties, in consequence of any contract or appointment; nor was there any privity in law; nor were they merchants in partnership in the adventure in question, the evidence completely disproving both a partnership in the concern, and an appointment as bailiffs. For these points they cited, *Co. Lit.* 172 *a.*, 1 *Mod. Ent.* 42., 4 *D.* & *E.* 720., 2 *Johns. Cases* 329., *Felici* v. *Hamilton*, *Ct. Ct. U. S.* 1806., 1 *Com. on Cont.* 286., 1 *P. Wms.* 18., 2 *Ves.* 252., 1 *Cha. Ca.* 238., *Bull. N. P.* 157., 1 *Com. on Contr.* 316., *Cowp.* 449., 2 *Co.* 68 *a.*, 1 *Domat.* 151., *Abbot on Ship.* 58., *Chitty on Pleading* 11., 1 *Saund.* 154., 1 *H. Black.* 37., 1 *Esp. Nisi Prius* 117., *Willes.* 208., 1 *Inst.* 172 *a.*, 2 *Johns.* 329., *F. N. B.* 267., 1 *Vin.* 141. *pl.* 10., *Id.* 139. *pl.* 2., *Id.* 143. *pl.* 1., 11 *Co.* 89 *b.* 2. That it could not be sustained under the statute of 4 *Ann. c.* 16., because that statute had never been extended to this country, to give account render by and against jointenants and tenants in common.

Dallas and *Ingersoll* contrà, contended that the plaintiff and defendants had by the verdict been found to be special partners, in which case it was plain that the action would lie at common law. And for this they relied upon 1 *Binn.* 191., *Co. Litt.* 172 *a.*, and *Co. Litt.* 171 *b. note* 34. Or at least they must be considered as tenants in common, in which case the action was given by the 27th section of 4 *Ann.*, which by the report of the judges had been adopted in practice in this commonwealth.

TILGHMAN C. J. On the trial of this cause, the counsel for the defendants contended that the action of *account render* did not lie. I told the jury, that this would depend on their opinion of the evidence; that the action did lie, if they should think that the plaintiffs were jointly interested with the defendants in the cargo, which formed the subject of controversy. We are all clearly of opinion, that this direction was right. For if the plaintiffs and defendants were *joint partners* in the adventure, the action of account render lay at common law; but if they were only tenants in com-

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mon of the goods, the action was given by the 27th sect. of the stat. 4 & 5 *Ann. ch.* 16., which section has been extended to this state, although the whole act has not.*

The great point in dispute was matter of fact, viz. whether or not the plaintiffs and defendants had *undivided* interests in a quantity of hides received by their agent at *Buenos Ayres*, and shipped, part to *Philadelphia* in the defendants' ship *Canton*, and part to *Bordeaux* in the plaintiffs' ship *America*. This fact depended on a mass of testimony written and parol, which it is unnecessary now to consider. I confess that neither at the trial, nor since, on further reflection, has it struck me in the same point of view in which it appeared to the jury. But that is not sufficient ground for awarding a new trial. I cannot clearly discern any principle of law which the jury have violated, nor will I undertake to say that they have gone so decidedly against the evidence, as would justify the court in setting aside the verdict. They were men of business and of character. The subject was complicated. Therefore, although the verdict was contrary to my expectation, I think it best not to disturb it.

YEATES J. I have examined the notes of the evidence in this case, with all the attention in my power. The adventure to *South America* has been most unfortunate to the parties. I cannot reconcile to my mind the amount of damages found by the jury, consistently with my idea of the true meaning of the original contract, under the circumstances and events which have occurred. But viewing the verdict in all its different aspects, I cannot say that it presents so plain a case of mistake of law or fact, in the jury, as would justify the interposition of the court. The facts are much complicated, and we cannot wonder that different inferences should be drawn therefrom by different minds.

As to the form of the action, I have no doubt that it would

* For such *British* statutes or parts of statutes as have been adopted in this commonwealth, the reader is referred to a report made by the judges of this court to the legislature of *Pennsylvania*, in conformity with a resolution passed in 1807. This report is, at the request of the court, inserted in an appendix to the present volume.

well lie; and that the 27th section of the *British* statute 4 & 5 *Ann. c.* 16., has been extended by our practice.

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On the whole matter, I find myself constrained to concur in opinion, that the motion for the new trial be denied.

BRACKENRIDGE J. concurred.

New trial refused.

3b 321
4b 13
4b 16
6s r 39
6s r 86
12 208

STUART *against* HARKINS

IN ERROR.

Philadelphia, Saturday, January 5.

If referees in an action of slander award to the plaintiff a sum *under* forty shillings, *with costs*, he is intitled to no more costs than damages. *Secus*, if they award *full* costs. This court has adopted the *English* rule, that although the court is bound by the statute, the jury is not, and they may give 10*l.* costs though they only give six pence damages.

UPON a writ of error to the Common Pleas of *Philadelphia* county, it appeared that the plaintiff had brought this action for slander; that it had been referred under the general issue to arbitrators, who reported in favour of the plaintiff *one dollar* damages, *and costs;* and that the Common Pleas had, on motion of the defendant's counsel, ordered the judgment to be entered for *one dollar damages, and one dollar costs.* The error was assigned in the judgment for costs, which it was said ought to have been rendered for *full* costs.

Shoemaker for the plaintiff argued, that although by the act of 27th *March* 1713, sec. 4., 1 *St. Laws.* 95., if a *jury* assessed damages in an action of slander in a sum under forty shillings, the plaintiff was intitled to no more costs than damages, yet the power of referees was not thus limited, they being judges both of the law and the facts; and this court had accordingly held in *M'Laughlin* v. *Scott*, (*a*) that where referees find costs of suit, the party is intitled to full costs, although the sum awarded will not carry costs by law. That in addition to this, the act of assembly under which the reference took place, authorized the arbitrators to decide all matters in variance, which included costs.

W. S. Biddle and *M. Levy* contrà, contended that the

(*a*) 1 *Binn.* 61.

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court ought not to extend the power of arbitrators under the recent acts of assembly, their operation being extremely severe upon the community; and that they ought to construe the award strictly, so that it should mean one dollar damages, and costs such as the law under these circumstances would give, that is to say, one dollar costs. This was the decision of the court below; and it was quite consistent with the language of the award upon a strict construction. The act of 1713 is explicit, that the plaintiff *shall not* recover more costs than damages; and the referees have no right whatever to violate the provision of the law. *Guier* v. *M'Faden* (*a*), *Walker* v. *Smith*. (*b*)

TILGHMAN C. J. This is an action of slander which was submitted to arbitrators, who made an award in favour of the plaintiff for one dollar damages, *and costs*, without saying how much. The court of Common Pleas entered judgment for one dollar damages and one dollar costs; and the plaintiff assigns for error that he was not allowed his full costs.

Our act of assembly of 27th *March* 1713 follows precisely the words of the statute 21 *James*, *ch.* 16. *s.* 6. In actions on the case for slanderous words, "if the jury upon trial of "the issue in such action, or the jury that shall inquire of the "damages, do find or assess the damages under forty shil- "lings, then the plaintiff or plaintiffs in such action, shall "have and recover only so much costs as the damages so "given or assessed do amount unto, without any further in- "crease of the same, any law &c. to the contrary in any wise "notwithstanding."

It is said in *Browne* v. *Gibbons*, *Salk.* 207., to be the resolution of all the judges of the Kings Bench and Common Pleas, that though the court is bound by the statute, and cannot increase the costs where the damages are under forty shillings, yet the jury are not, and may give 10*l.* costs, and but 10*d.* damages. This construction was certainly founded upon a very subtle distinction, tending to defeat in a considerable degree, the intent of the statute. However, being directly in point, it was considered as settling the law, and

(*a*) 2 *Binn.* 587. (*b*) 4 *Dall.* 389.

has accordingly been adopted by this court in construing our act of assembly. Verdicts have been frequently taken at *Nisi Prius* for damages under forty shillings and *full costs*, and in such cases, judgments have always been entered for full costs. But no case has occurred, like the present, where the jury neither found costs in a sum certain, nor *full* costs, which by reference may be reduced to a certainty, but only in general *costs*. I am not for extending the construction of the act of assembly beyond the adjudged cases; for I doubt very much the propriety of having extended it so far. Where the verdict finds *costs*, without mentioning how much, it should be intended such costs as are by law allowed in the case, to wit, costs to the amount of the damages, and no more. The present case is not the finding of a jury, but the award of arbitrators. Under an act of assembly in this case, which is a submission to arbitration by *agreement*, I consider them as the same. Judgment is given on the award in the same manner as if there had been a verdict.

But the plaintiff relies on the case of *M'Laughlin* v. *Scott*, 1 *Binn.* 61., where the award being for 91 dollars and 30 cents, and *costs of suit*, judgment was entered for *full* costs. That case arose on a different act of assembly of the 25th of *September* 1786, by which it is provided, that if any plaintiff shall bring an action in the Supreme Court, and shall not recover therein more than 50*l.*, such plaintiff shall not be allowed *any* costs of suit. When the arbitrators then made an award for *the costs of suit*, it could be intended nothing but the *full* costs, because the act did not restrain the amount of the costs, but took them away altogether. The case of *M'Laughlin* v. *Scott* appears to have been decided hastily,* and on very little argument; but as it turned on a point not necessary to be now discussed, I shall make no further remark on it. In the case now before us, where the award was neither expressly nor by necessary implication, for costs to a greater amount than the damages, I am of opinion, that

* The Chief Justice is undoubtedly correct in saying that this case was decided upon very little argument. It was in consequence of Mr. *S. Levy*'s being told by the late Mr. Justice *Smith*, that the law was too well settled to admit of an argument. Mr. *Levy* then gave the case up, and the plaintiff took his judgment and execution for full costs.

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the judgment of the court of Common Pleas was right, and should be affirmed.

YEATES J. The single question in this case is, whether on the award of referees in an action of slander, finding for the plaintiff *one dollar damages and costs*, the plaintiff is legally intitled to his full costs?

An act of assembly, passed 27th *March* 1713, 1 *Dall. St. Laws.* 97. sect. 4, directs that in all actions for slanderous words, where the jury shall assess the damages under 40*s.*, the plaintiff shall have and recover only so much costs, as the damages so given or assessed do amount to, without any further increase of the same. It pursues the words of the statute of 21 *Jac.* 1. *c.* 16., under which it has been determined, that the jury are not bound by the statute, but may give 10*l.* costs, where they give but 10*d.* damages. 1 *Salk.* 207. See also *W. Jones* 196., 2 *Vent.* 36. Decisions upon the same principle have taken place in our courts. It has been very customary both at *Nisi Prius* and in the Circuit Courts, where juries in actions of slander have given a verdict for damages under forty shillings, in causes removed by defendants, or under 50*l.* in causes removed by plaintiffs, to inquire of them, whether they intended to find full costs, and where they have answered in the affirmative, the plaintiffs afterwards obtained their judgment for costs. It has been said, that where a jury finds *costs*, they must be supposed to find *full* costs. But this does not necessarily follow, because their words may be fully satisfied, by the plaintiff's recovering such costs, as are allowed by the act of assembly, viz. as much costs as damages. The same observation might be made, where the jury found beyond the damages six cents costs. But in a late case in the Western District at *Pittsburg*, where in slander damages were found under forty shillings, with six pence costs, this court decided, that the plaintiff was intitled to no more costs than damages; and in *Frederitze* v. *Odenwalder*, tried at *Nisi Prius* in *Northampton* county, the plaintiff in slander removed his cause to this court, and obtained a verdict for twenty-five dollars damages, with six cents costs. This court on argument, in *March* term 1799, held that he should not recover costs.

M'Laughlin v. *Scott*, 1 *Binn.* 61., which was cited on the argument, may readily be distinguished from this case. There to give effect to the finding of the referees, the court held themselves authorized to render judgment, that the plaintiff should recover costs. Their words were susceptible of no other construction, but it is not so here. I will at present neither affirm nor deny the authority of that case. It may probably undergo future examination. It certainly underwent little or no discussion. I have no note of it, neither is any to be discovered amongst the papers of the late Judge *Smith*.*

It has moreover been objected, that the present case is not the assessment of damages by a jury, but the finding of referees, who are judges both of the law and fact. I see no weight in this objection. Under the old defalcation act of 1705, "the award or report of referees, made according to "the submission of the parties, and approved by the court, "and entered upon the record or roll, shall have the same "effect, and be as available in law as a verdict by twelve "men." I can discover no solid ground, on which referees under a rule of court, can claim an exemption from the obligations of positive laws. Verdicts and awards made to court, are placed upon the same footing precisely.

Upon the whole, I am of opinion, that the judgment of the court of Common Pleas has been correctly entered, and that their judgment be affirmed.

BRACKENRIDGE J. gave no opinion, having been engaged at *Nisi Prius* when the cause was argued.

Judgment affirmed.

* The reporter recollects perfectly well, that after the decision of the court had been given, the late Judge *Smith* said, "the law has been set-"tled ever since the case in *Salkeld*," probably referring to *Browne* v. *Gibbons*, 1 *Salk.* 206. But as this remark was not confirmed by any other judge, and the judgment had already been pronounced, the reporter, though he took a note of it, did not insert it in the report.

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Philadelphia, Saturday, January 5.

A paper which is not evidence *per se* in a suit between the underwriter and the assured, does not become so for any purpose, in consequence of having been exhibited by the latter to the former as one of the preliminary proofs of loss; except the question be merely whether such a paper was exhibited.

THURSTON and another *against* MURRAY.

THIS cause was tried at a *Nisi Prius* in *November* last, before Mr. Justice *Brackenridge*.

It was an action on a policy of insurance on three fourths of the freight of the ship *Mary*, at and from *Amsterdam* to *Surinam* and back.

The ship sailed from *Amsterdam* on the 26th of *April* 1796, and three days afterwards was captured by a *British* frigate, and carried into *England*. On the 27th *January* 1802, the agent of the assured exhibited to the defendant's broker, a paper purporting to be a copy of a decree of the court of appeals in prize causes, condemning the cargo as prize. This document was not under seal; but at the time it was shewn, an indorsement was made upon it, stating the day of its exhibition, and that it was the decree of condemnation.

Upon the trial of the cause, this paper was offered in evidence generally to the jury. The counsel of the defendants did not object to the reading of the indorsement, to shew that the paper had been seen by the defendant's broker; but objected to the contents being read to the jury for any purpose. His honour, however, permitted it to be read, not as evidence of the truth of any matter contained in it, but to shew a communication from the plaintiffs, at the same time reserving the point; and this was the question before the court, upon a motion for a new trial by the defendant.

Tilghman and *Ingersoll* for the defendants. If there had been a dispute whether the document in question had been shewn to the underwriters, it might have been proper to produce it with a view to ascertain that fact; but the fact was not denied. The paper had not a feature of evidence about it, except what it derived from its exhibition at the insurance office; and it is monstrous to contend that every paper exhibited to the insurers, or even the papers which they expect to be exhibited to shew a loss, should become evidence by be-

ing shewn. *Senat* v. *Porter* (*a*) is directly to the contrary. It applies *à fortiori;* for in that case the court would not permit the underwriter to give in evidence the captain's protest, though it had been exhibited by the assured.

Dallas for the plaintiffs. The sentence was not read as evidence of the truth of any fact asserted in it, but merely to shew that such a paper had been exhibited to the underwriters. It was admitted that the indorsement might be read, and the indorsement in fact stated all that was contained within. The jury were informed by the judge that it was not evidence of any decree having been made, and therefore the defendants were not injured by it. It was a paper which had been exhibited as proof of loss; it was one which is always expected and demanded among the preliminary proofs, if it exists; and the mere exhibition of it intitled the plaintiffs to the benefit of any inference arising from their compliance with the usual practice, and the demands of the assured. In *Ruan* v. *Gardner*, (*b*) the protest of a sailor, made not at the first port after loss, but on his return to *Philadelphia*, and presented to the underwriters, was allowed to be read in evidence for the purpose of shewing a compliance with that clause of the policy, which provides that payment shall be made within thirty days after proof of loss, although the facts contained in it were not evidence to be laid before the jury to prove the loss. This is the distinction upon which we assert the competency of the paper in question.

TILGHMAN C. J. On the trial of this cause at *Nisi Prius*, Judge *Brackenridge* reserved a point of law, for the consideration of this court. The agent of the plaintiffs, when he demanded payment of the loss, lodged with the broker through whom the insurance was effected, sundry documents to prove the loss, and among others, a writing purporting to be a copy of a decree of the *English* court of appeals in admiralty cases, not certified under the seal of the court. The defendant's counsel objected to the reading of this paper to the jury; but it was permitted to be read, not as evidence of

(*a*) 7 *D.* & *E.* 158. (*b*) 2 *Condy's Marshall* 716. *note.*

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the truth of the matter contained in it, but as evidence of a communication from the assured to the underwriter. This point involves a question of considerable importance, whether the assured shall be permitted to bring, before the jury, papers which in themselves are not legal evidence. It is agreed, that the copy of the decree was not, *per se*, evidence. Why then should it be read? Because, say the plaintiffs, it was exhibited to the defendant's broker, as one of the proofs of loss; and it is expected by the underwriters that these proofs of loss should always be exhibited. Upon the same principle, every paper which the assured wishes to read, however improper in itself, may be brought before the jury; for it is in his power to lay before the broker what papers he pleases. Although the underwriters expect that the assured should inform them of all material intelligence received respecting the loss, yet it does not follow that in case of dispute, it is their intention, that illegal evidence shall be introduced at the trial. If the defendant had charged the plaintiffs with improper conduct, in withholding from him the information which they had received respecting the loss, it might be necessary to obviate that objection, by proving that they had lodged the papers with the broker. But the defendant did not deny, that this paper had been communicated. On the contrary, he was willing that the jury should read the indorsement on it, by which it appeared that the broker had received it. It has been said, that the defendant was not injured by reading it to the jury, because they were told by the court, that it was not evidence of any decree having been made. But I am of a different opinion. The reading of it might, and if I may judge from the verdict, did make an impression, which the court could not erase. We are now to establish the rule in cases of this kind; and it appears to me that it will be of dangerous consequence, if papers are thus introduced by a side wind, which not being evidence in themselves, could not be brought forward directly. The distinction of being evidence for one purpose, and not for another, is too subtle for the jury; they will not forget what has been read to them. The case of *Senat* v. *Porter*, 7 *D.* & *E.* 158., was much stronger than this. There the defendant attempted to read in evidence, the captain's

protest, which had been shewn to him by the plaintiff's broker. There was some little plausibility in the argument, that the plaintiff having produced this paper himself, ought not to object to its going in evidence; but the court were clearly of opinion, that it was not evidence. It seems that in that case, the defendant's counsel did not think of the ingenious artifice which has been resorted to here.

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I am of opinion, that the paper, which was objected to in this case, ought not to have been read, and therefore there should be a new trial.

YEATES J. concurred.

BRACKENRIDGE J. I am not prepared to dissent from the opinion of the Chief Justice. I admitted the evidence with considerable doubt, and am now satisfied to take the rule as it is laid down by my brethren.

New trial awarded.

3b 329
7s r376
1pw386

WELSH administrator of EDWARDS *against* DUSAR.

Philadelphia, Saturday, January 5.

THIS was an action of *assumpsit*, in which the declaration contained three counts: 1. *Indebitatus assumpsit* for work, labour and services. 2. *Quantum meruit* for the same.

A went as supercargo from *Philadelphia* to *Batavia*, under an agreement between the shippers, which so far as respected his compensation was thus: "The commission, which is to be four per cent. on the investment, is also to be paid in *Batavia*, "and invested on account of *A*." *A* died in thirty-six hours after his arrival in *Batavia*, without having made any investment of the cargo. *Held*, that he was intitled to a proportionate compensation, deducting from the whole commission of four per cent. what it would cost the shippers to complete the investment at *Batavia*.

The agreement between shippers, owners and supercargo, after stating the proportions of the shippers, and the object of the shipment, proceeded thus: "The freight which is to "be twenty-five per cent. on the sum shipped, is to be paid in *Batavia*, and invested in the "said ship, on account of *D*" the owner; "the commission which is to be four per cent. on the "investment is also to be paid in *Batavia*, and invested on account of *A*" the supercargo; "*but after the property of the shippers is all on board.*" *Held*, that neither *A* nor *D* was intitled to a preference in the loading of their goods on board the ship, and the ship being nearly full with the goods of the shippers, they must load in proportion to their interests.

The construction of written instruments is the province of the court; and it is of the utmost importance that this province should not be invaded by the jury.

Upon granting a new trial, the court, if they think it expedient, will lay the party who applies for it under a condition to try the merits without regard to the form of the declaration.

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3. *Indebitatus assumpsit* for money had and received. Plea, the general issue.

The cause was tried at *Nisi Prius* before the Chief Justice in *October* last; and now upon a motion for a new trial, the case reported was as follows:

The action was brought to recover the amount of the profit which was lost by *Edwards*, in consequence of not having certain commissions, claimed by him, invested at *Batavia*, and returned in the defendant's ship *Martha* to *Philadelphia*, agreeably to contract.

On the 22d of *August* 1803, in some measure by the exertions of *Edwards*, shippers were procured, who agreed to send 54,000 dollars in the defendant's ship to *Batavia*, under the following contract. "We whose names are hereunto subscribed, promise and bind ourselves to put on board the "ship *Calliope* or *Martha*, *William Henderson* master, *Richard* "*Edwards* supercargo, the respective sums annexed to our "names, on or before the first of *September;* which money is "for the purpose of purchasing a cargo at *Batavia*, agreeable "to the instructions to *R. Edwards*. The freight, which is to "be 25 per cent. on the sum shipped, is to be paid in *Batavia*, and invested in the said ship *Calliope* or *Martha*, on "account of *F. Dusar;* the *commission* which is to be 4 per "cent. on the investment, is also to be paid in *Batavia*, and "invested on account of *Richard Edwards*, *but after the property of the shippers is all on board.*" On the 7th of *September* the defendant wrote a letter of instructions to *Edwards*, which was also subscribed by the shippers, telling him to invest the 54,000 dollars in coffee, if the *Dutch* government would permit, if not, to obey the orders of government. The sum which remained after deducting freight and commissions, 38,942 dollars, was the sum to be invested on account of the shippers; 12,981 dollars on the defendant's account as owner; and 2077 dollars as the commissions of *Edwards*. "The only equitable mode," proceeded the letter, "to ship such a cargo, is to make out a "separate invoice for each shipper, properly numbered and "marked with their different marks; then *my freight as* "*owner*, *your commissions*, *and the officers' privileges*, *may* "*be invested and stowed in bulk to the best advantage*, *amongst*

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"*the cargo.* Captain *Henderson* is directed to follow your "instructions as to loading." There was another agreement, and a letter of instructions to the captain, differing in some particulars from these, but without the privity of *Edwards.*

Edwards attended to the packing of the dollars, and getting them from the bank, on board the *Martha*, in which he sailed, and arrived at *Batavia* in *February* 1804. He died in thirty-six hours after he landed. Captain *Henderson* then made application to the *Dutch* government for permission to load, which he obtained, and superintended the loading with all the risk incident to such business in *Batavia* at that season; but the ship would not contain the whole investment. 2000 dollars were brought home in specie, on account of the defendant's freight, and 1500 dollars besides. On his return to the *United States*, captain *Henderson* received the whole commissions from the shippers, and for these the plaintiff agreed to look to him; his claim against the defendant was for the profits which would have been made by the commissions if invested, and which the defendant had received in consequence of having his freight invested to the exclusion of the commissions. Evidence was given to the jury to enable them to calculate these profits; and it was proved that it was usual at *Batavia* to allow from two to two and an half per cent. to persons employed by the government, for investing and loading a cargo, where captain and supercargo both died.

The counsel for the plaintiff contended, 1. That *Edwards* was intitled to full commissions, or 2. To a proportion, which by the evidence was at least a moiety. 3. That by the agreement the commissions were to be shipped in preference to the freight, or 4. At the same time and in the same proportion with the freight.

The defendant's counsel asserted the negative of all these propositions, and at the same time insisted that the form of action was wrong, which was reserved for consideration in bank.

The Chief Justice charged the jury in substance as follows:

The principal questions between the parties are in the first place, which of them was to have a preference in the lading of their goods on board the *Martha;* and in the next place,

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whether *Edwards* was intitled to *any* commission at all, and if to any, then to how much, since he died in thirty-six hours after the ship arrived at *Batavia*, and before any part of the specie was invested.

The last question demands our consideration in the first instance, because it is the foundation of the plaintiff's claim. The defendant contends that the performance of *all* the services expected from a supercargo, is a condition precedent to his right to receive *any* compensation; that in a contract of this kind, there can be no apportionment; the supercargo must perform *all* the services, and be intitled to *all* the commission, or to no part of it. In support of this principle a case was cited, *Cutter* v. *Powell*, 6 *D.* & *E.* 320., which I think is not applicable. It was the case of a second mate shipped in the *West Indies* on a voyage to *England*. The contract was in writing, and so expressed, that the owner was bound to pay the mate very extraordinary wages, in case he rendered his services during the whole voyage. He died on the passage; and it was decided that nothing was due. But it is evident that the court gave this opinion with reluctance, and founded it on the words of the contract, which were too special and too strong to be got over. It is a hard doctrine; and unless the parties clearly meant that *nothing* should be paid unless the *whole* services were performed, justice requires that in the case of part performance there should be a proportionate compensation. In the common case of servants who hire for a year, it was formerly held, that a servant dying in the year was intitled to nothing. The law is however now held differently, because it is supposed, that unless the contrary is expressed, the understanding of the parties is, that the servant shall be paid in proportion to his services. In the present case the agreement is very loose. It is not even said what services are to be performed. But we are not tied down by the words of the contract; nor is there any evidence of the understanding of merchants, by any custom on this subject. I am therefore inclined to construe the agreement in the most equitable manner; which is, that the supercargo shall be paid in proportion to his services. To say that he should have the *whole* would be extravagant; for in truth he performed but little. The jury must fix the proportion. In doing this they will naturally consider what

it would cost the owner to complete the business; this should be deducted, otherwise the shippers will be made to pay more than they agreed for. From the evidence in the case, I should not suppose that the unfinished business could be done for less than two per cent. at least. If so, one half should be deducted from the commissions. Of this however the jury are the judges.

Let us now consider the other point. The plaintiff says that the goods of *Edwards* should have been put in, in preference to the defendant's; he therefore claims from the defendant the profits which *Edwards* would have made, in case his money had been invested and put on board the *Martha*. He does not claim the commission, but only the profit on it. As to the commission itself, he looks to captain *Henderson*, who stepped into the place of *Edwards*, and received it. To decide this point, we must look to the written contract. It is drawn in that loose manner which merchants are apt to use, trusting too much to good faith. It is not signed by either *Edwards* or the defendant; but that is immaterial, since they have done enough to shew that they adopted it. By this writing the shippers have a clear preference. But as to the owner and supercargo, I do not think that either has a preference, because the words "after the property of the "shippers &c." apply equally to both of them.

The Chief Justice then mentioned another writing by which *Edwards* was clearly postponed to *Dusar;* but he expressed a strong doubt whether *Edwards* was privy to it, and left that fact to the jury. If they thought it was well proved, he instructed them to find for the defendant; if not, they were next to consider what damages the plaintiff was intitled to, which would depend upon the amount of commissions they should think due to *Edwards*. But as neither *Edwards* nor the defendant was intitled to a preference, the jury would have to consider the amount of the defendant's freight, the amount of *Edwards's* commission, and ascertain the proportion that each was intitled to put in, taking into consideration at the same time the amount brought home in specie for the defendant. The profit on this proportion was the sum for which the verdict ought to be given, with such interest as the jury might think proper to allow.

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The jury found for the plaintiff 3261 dollars and 45 cents damages, upon the ground that *Edwards* was intitled to the whole commission.

J. R. Ingersoll for the defendant. The verdict is clearly against law and the charge of the court; not upon the ground that *Edwards* was not intitled to any commissions; for the Chief Justice having ruled that point in the plaintiff's favour on the trial, the defendant acquiesces; but upon the ground that he was not intitled to full commissions, and to a preference in their investment. The jury could not have found such a verdict, without erring in both respects; and in both the charge was most explicit in our favour. In point of law it is conceived that the plaintiff ought not to have recovered any thing, because *Dusar* was intitled to a preference. The order in which the respective interests were to be invested, is clearly pointed out in the agreement of the 22d *August* 1803. It is the order in which they are mentioned in that agreement. It is clear at all events that *Edwards* had no preference, because upon the most liberal construction for him, the words "after the property of the "shippers is all on board," refer to both freight and commissions.

As to the reserved point, it is perfectly reasonable that the proof should tally with at least one of the counts in the declaration; but here it agrees with neither. The counts for work and labour will not answer, because the demand was for profits not commissions; and the count for money had and received is bad, because there was no evidence that the defendant had ever received a cent of the money of *Edwards*. The foundation of the demand was that his money was not invested in goods and shipped, but that the defendant's goods unjustly occupied its place. It should have been a special action on the case. The plaintiff ought not to disguise such a demand under a general count. We should have had notice by the *narr.* *Longchamps* v. *Kenny* (*a*), *Weston* v. *Downes* (*b*), *Bull. N. P.* 129., *Weaver* v. *Boroughs* (*c*).

(*a*) *Doug.* 133. (*b*) *Doug.* 23. (*c*) *Stra.* 648.

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Ross and *M. Levy* contrà. The right to full commissions wanted but little of being complete when *Edwards* died. He had promoted the adventure in a very great degree, superintended the shipment, and accompanied it to *Batavia*. The labour there was the smallest part, and the jury have allowed for it accordingly under the charge of the Chief Justice, who left the proportion to them. As to preference, it was a fact which the jury have decided in our favour, and their verdict should not be disturbed. It is the true construction and meaning of the agreement of the 22d of *August*. The goods of *Edwards* were not to be put in, until the goods of the shippers were on board; but the implication is necessary that they were to go in then, that is before any other goods.

The plaintiff could not bring a special action on the agreement, because *Edwards* was not named in it. *Green* v. *Horne*. (*a*) Neither had he performed the entire duty of a supercargo; therefore if the special agreement had been set forth, he must have been nonsuited, because he could not have proved the agreement *in toto*. His only remedy was an equitable one, through the medium of the general counts. In equity the defendant had received his money, because he had received the profits which should have come to *Edwards*. There are many instances of equitable remedies, where there are none at law. 1 *Fonbl.* 144., *Abbot on Ship.* 199. 206., *Edwin* v. *East India Company*. (*b*) New trials are in the discretion of the court. If justice is done, they will not regard form. If they grant a new trial they will lay the party under terms, so that he shall not take advantage of form.

Ingersoll, who was about to reply, was stopped by the court.

TILGHMAN C. J. This is a motion for a new trial. The cause was tried before me at *Nisi Prius*, when the dispute was principally on two points. 1st, Whether *Richard Edwards* was intitled to any and what commissions. 2d, Whether in shipping the goods in which his commissions were

(*a*) 1 *Salk.* 197. (*b*) 2 *Vern.* 210.

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to be invested in *Batavia*, he was intitled to a preference to the defendant, the owner of the ship. With regard to the first point, the defendant contended, that *Edwards* was intitled to no commissions at all, because he died before the completion of the voyage. My opinion was, that he was intitled to a compensation in proportion to the service performed; and as that opinion has not been objected to, it is unnecessary to say any thing more on the point.

On the second point, the opinion which I delivered, and which I still retain, was, that *Edwards* was not intitled to a preference, but he and the defendant stood on the same ground. This question depends chiefly on the articles, signed by the shippers, which, although not signed by either *Edwards* or the defendant, were undoubtedly adopted and acted upon by both, so that they are to be considered as parties. In these articles, dated 22d *August* 1803 there is the following clause—"The freight which is to be 25 per cent. "on the sum shipped, is to be paid in *Batavia*, and invested "in the said ship *Calliope* or *Martha*, on account of *Flori-* "*mond Dusar;* the commission which is to be 4 per cent. is "also to be paid in *Batavia*, and invested on account of "*Richard Edwards*, but after the property of the shippers "is all on board." These last expressions "after the property "of the shippers is all on board," are to be applied to all the preceding parts of the clause, that is to say, both to the investments of freight, and of commission. To restrain them, as contended for by the plaintiff, to the commissions, would leave the shippers unprotected against the shipment of the proceeds of the freight, in case there should not be room enough for both. This would be an unreasonable construction; for it must be supposed, that the shippers who paid 25 per cent. for freight, intended to provide that at all events their own goods should be first put on board. And this supposition is very much strengthened, by the instructions from the defendant to *Edwards*, dated *September* 7th, 1803, and signed both by the defendant and the shippers. In these instructions are the following directions. "The only equita- "ble mode to ship such a cargo, is, to make out a separate "invoice for each shipper, properly numbered and marked "with their different marks. Then my freight as owner,

"your commissions, and the officer's privileges, may be in-
"vested and stowed in bulk to the best advantage amongst
"the cargo." Here seems to be no idea of any preference to the commissions. Indeed these instructions are not to be reconciled with such a preference. Now the jury have gone directly contrary to the law; for their verdict is founded on the principle of *Edwards's* preference. The construction of written instruments is the province of the court; and it is of the utmost importance, that this province should not be invaded by the jury. The certainty and uniformity of the law very much depend on it. At the same time, I shall be extremely careful not to invade those rights which the law has vested in the jury. This verdict is in another respect contrary to law. *Edwards* was intitled to an apportionment of the commission, but had no pretence to claim the whole. But the verdict cannot be supported unless he was intitled to the whole. I am very clear therefore that there should be a new trial; but there is a condition which I would annex to it: and that is, that the defendant should try the cause on its merits, without objecting to the form of the action, or to the declaration. As the law now stands, under our acts of assembly, the plaintiff would be intitled to an amendment. But it is a case of a very singular nature, and an amendment might involve the plaintiff in difficulties, to which I think under all circumstances he ought not to be exposed.

YEATES J. of the same opinion.

BRACKENRIDGE J. of the same opinion.

New Trial awarded.

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Philadelphia, Saturday, January 5.

The Bank of North America for the use of SWIFT *against* M'CALL.

EXCEPTIONS to a report of referees.

If a creditor of *A* lays an attachment upon goods which appear as the property of *A*, but wherein *B* has nevertheless an interest which he communicates to the creditor before the attachment is laid, the creditor is bound to refund *B* his proportion of the money recovered under the attachment, notwithstanding the judgment of a competent court decreed the whole to him as the property of *A*.

Qu. Whether it is the same with an equitable assignee of *A* who gives no notice of his claim until after the attachment.

George Plumstead deceased, and *Swift* the plaintiff in interest, made a shipment on joint account to *St. Domingo* in *October* 1804, the bill of lading and the invoice of which were made out in the name of *Plumstead* only. *Plumstead* died in *April* 1805, and being indebted to the defendant in 2600 dollars upon two promissory notes, the defendant gave instructions to have his property attached in *St. Domingo*. It was accordingly attached in *June* following; and the coffee, &c. which proceeded from *Plumstead's* shipment, was delivered over by virtue of the attachment to the defendant's agent, who forwarded it to him at *Philadelphia*. The proceedings of the court at *St. Domingo* were very regular, there being a petition for leave to attach, permission to attach, and a return of attachment, petition to summon the garnishees, citation to the garnishees, a return of service, and a decree reciting the proved account and power of attorney of *M'Call*, the declaration of the garnishees that they had coffee in their hands belonging to *Plumstead* to the amount of 5000 dollars, and then confirming the attachment, and ordering the garnishees to pay 2600 dollars to the plaintiff, without prejudice to interest and costs. The present action was for *money had and received*, to recover the interest of *Swift* in the shipment, both as partner of *Plumstead*, and also in *Plumstead's* right, by assignment from the Bank of North America, who held the original bill of lading with a blank indorsement from *Plumstead*, as a security, and had transferred it to *Swift* upon being paid their claim. Both the account and power of attorney, referred to in the decree of the court, spoke of *Plumstead* as being deceased.

The referees reported in favour of *Swift* 4924 dollars and 60 cents, being the whole amount principal and interest which the defendant had received from his attachment.

The exceptions were two, 1. That the referees erred in

fact, in taking for granted that *Swift* was jointly interested with *Plumstead* in the shipment to *St. Domingo;* whereas he either was not so at all, or only in a small degree. 2. That they erred in law in not considering the attachment and proceedings in *St. Domingo*, relative to the property, as conclusive against *Plumstead*, *Swift*, and the Bank.

Upon their examination relative to the facts, the referees stated that they did not take *Swift's* interest for granted. They were satisfied from the evidence that *Swift* and *Plumstead* were jointly concerned, and that the adventure was indebted to *Swift* as joint partner. They also stated that before the defendant ordered the attachment, he had notice of *Swift's* interest, although it did not appear that he had any knowledge of that of the Bank.

B. Tilghman for defendant. The *first* exception is not made out; but I contend that the attachment is conclusive as to one half the property belonging to *Plumstead*, which he assigned to the Bank in whose place Mr. *Swift* stands. The case of *Rappelje* v. *Emory* (*a*) is in point. The defendant fairly recovered this money by the judgment of a court of competent jurisdiction as the property of *Plumstead;* and this judgment cannot be reversed in a collateral way. 4 *Cranch* 511, 512., *app.* The Bank had opportunities of giving notice to the defendant, and neglected to do it. If they had an interest, they must be content to see it postponed to those who had as good claims against *Plumstead*, and were more vigilant in prosecuting them. As to *Swift's* part, in his own right, I leave that to the court; it may be upon a different footing from the other in consequence of the notice.

Condy for the plaintiff. There can be no doubt as to *Swift's* proportion, because after notice of his interest, it was manifestly against good conscience in the defendant to attach the property as *Plumstead's;* and in fact, the adventure owes *Swift* more than the award. The same principle goes further. He knew that *Plumstead* was dead, and that his property had vested in his administrators for the benefit of his creditors generally. Under such circumstances the attachment passed no right to the defendant. He held the property as

(*a*) 2 *Ball.* 51.

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it was held before, subject to the claims of *Plumstead's* assignee the Bank, who have a superior equity. In fact the proceedings were altogether void, being against a dead man. The court should not have proceeded against him. No court professing to act upon principles of reason, would have countenanced the suit. A court of the revolted negroes is not intitled to the application of that principle which upholds the judgments of foreign judicatures. *Rappelje* v. *Emory* was quite different; there was a strong equity in *Emory*, but there is none in the defendant. The attachment was there against the general effects of the debtor, it was here against specific effects. If a debt of *B* is attached as the debt of *A* and recovered, the plaintiff in the attachment may be safe; but if goods belonging to *B* are attached as the goods of *A* and recovered, the plaintiff must answer to the real owner.

Tilghman in reply. The only question is whether the judgment of the court at *St. Domingo* against a dead man, known to be dead, is valid. The court knew that *Plumstead* was dead, for by their decree they refer to papers which recited it; and therefore it is to be presumed that by the law of *St. Domingo* that circumstance did not alter the case. It is always to be presumed, until the contrary is shewn, that the proceedings of a foreign court are conformable to the law of the place; *Rappelje* v. *Emory*; (*a*) and that law must govern. *Burrows* v. *Jemino* (*b*), *Embree* v. *Hanna* (*c*). As to the competency of the tribunal, the blacks have the government *de facto*; and this court can recognise no tribunal that does not proceed from that source. The Bank and its assignee have no equity whatever, since they neglected to pursue their rights. *Swift* gave notice. We agree that the award should be confirmed as to his half.

TILGHMAN C. J. delivered the court's opinion.

The *first* exception in this case, is founded in matter of fact. The arbitrators have been examined, and it appears that this exception has not been supported.

In the second exception two points of law are involved. *John W. Swift* had claims in two distinct rights: one as surviving partner of *George Plumstead*; the other by virtue of

(*a*) 2 *Dall.* 231. (*b*) 2 *Stra.* 733. (*c*) 5 *Johns.* 102.

an assignment from the Bank of North America, who had received an assignment from *Plumstead* in his life. Before the defendant laid the attachment in *St. Domingo*, he had received notice of *Swift's* claim, as surviving partner; but he had received no notice of the claim of the Bank. It is evident that the claim in his own right stands on much stronger ground than that derived from the bank. Accordingly the defendant's counsel, although they have urged serious objections against the assignment from the bank, have yet admitted that the defendant, having laid the attachment after notice of *Swift's* right as surviving partner, is responsible to *Swift* for the money recovered on the attachment, to the amount of the balance due to him from the partnership. Now this precludes the necessity of going into the claim derived from the Bank, because it appears from the proof made before the arbitrators, that the balance due to *Swift* from the partnership exceeds the sum awarded to him. We are therefore of opinion that the defendant has failed in all his exceptions.

Award confirmed.

A doubt having been afterwards expressed by the defendant's counsel, whether the amount of *Swift's* claim against the partnership was equal to the sum awarded, the court recommitted the report to the same referees to ascertain the amount of *Swift's* lien on the partnership stock, and directed judgment to be entered for it in vacation upon the return of the award.

END OF DECEMBER TERM 1810.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

Eastern District. March Term, 1811.

MEMORANDUM. In the vacation between *December* and *March* terms, *Richard Rush* esquire was appointed attorney-general in the place of *Walter Franklin* esq. who was made President of the courts of Common Pleas in the second Judicial District.

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Philadelphia, Saturday, March 30.

The BANK OF NORTH AMERICA *against* FITZSIMONS.

A judgment not revived by *scire facias* within five years from its date, ceases to be a lien upon real estate, as well against subsequent judgment creditors, as against subsequent purchasers.

THIS cause came before the court upon a case which stated as follows:

At *September* term 1797, judgment was entered in this court at the suit of *Samuel* and *William Hibbert* against *Thomas Fitzsimons* as special bail of *George Green; but no* scire facias *ever issued to revive the said judgment.*

A *scire facias* issued out of the same court returnable to *September* term 1804, at the suit of the President, Directors and Company of the Bank of North America, against the defendant, upon a mortgage made and dated the first day of *February* 1798, and given for payment of 30,000 dollars, loaned by the bank to the said *Thomas Fitzsimons* on condition of the said mortgage being given to secure the payment thereof, but not recorded till the 24th of *December* 1798. Judgment was confessed at the first term; and under

a *levari facias* issued thereon returnable to *December* term 1804, such of the mortgaged premises as are situated in the county of *Philadelphia*, have been sold by the sheriff; and by an agreement signed, the money is to be considered as in court.

At *September* term 1799, *Benjamin Fuller* obtained judgment in the same court against *Thomas Fitzsimons* for a sum of money, which with the accumulated interest exceeds the amount of sales by the sheriff; and on the 20th of *March* 1800 this judgment was revived by a judgment obtained on a *scire facias* issued thereon at the suit of *William Lewis* esq. executor of the last will of *Benjamin Fuller*, against the said *Thomas Fitzsimons*.

On or about the first day of *March* 1801 the President &c. of the Bank of North America had actual notice of the judgment of the said *Samuel* and *William Hibbert*.

The question for the opinion of the court is, whether *Samuel* and *William Hibbert* are intitled to the payment of their said debt out of the amount of the said sales.

It was argued at *December* term 1810 by *Hallowell* and *Ingersoll* for the *Hibberts*, by *Lewis* for *Benjamin Fuller's* estate, and by *Gibson* and *Rawle* for the Bank of North America; it being agreed between the Bank and Mr. *Lewis*, that the court should not settle the question of priority between them, but only as between them and the *Hibberts*.

Arguments for the Hibberts. The question depends entirely upon the 1st section of the act of 4th *April* 1798, 4 *St. Laws* 300., which enacts that no judgment then on record in any court within this commonwealth, should continue a lien on the real estate of the defendant, during a longer term than five years from the passing of the act, unless revived by *scire facias*. The language of this section is, it is true, very positive; but notwithstanding this, we contend that by perfectly established rules of construction, this statute does not take away our lien as against these parties.

The case is to be considered under two points of view. 1. As it respects the mortgage more particularly; and we have our lien as against it, because the act was not intended

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to alter the relation subsisting between parties at the date of the law; but only to provide for such interfering claims as should arise after the expiration of the five years. 2. As it respects the subsequent judgment, against which also the lien continues, because according to the true spirit and meaning of the act of assembly, the lien ceases only against subsequent *purchasers* without actual notice, but not against subsequent judgment creditors.

1. At the date of the act of 1798, the judgment of the *Hibberts* was a perpetual lien, to which the mortgage of the Bank was as much subject, as if a clause to that effect had been inserted in it by the parties. The act cannot disturb this lien without having an *ex post facto* effect, which would be unconstitutional. It is therefore proper to infer that the legislature did not intend to disturb it. They did not mean to vary the rights of individuals as they existed at the time of the act, but to provide for the safety and convenience of those who should afterwards have occasion to act in relation to the subjects contemplated. Why should the legislature require a *scire facias* for the benefit of those who had notice of the judgment, and took subject to it? Upon the most rigid construction we were not bound to issue a *scire facias* until the 4th of *April* 1803; but why even then, as it respects the mortgagee, or the judgment creditor, when the Bank had *actual* notice as early as *March* 1801, and the creditor constructive notice by fair presumption of law, from the moment our judgment was signed? What is the use of a *scire facias* but to give notice? None. The 3d section, as will be seen hereafter, directs the service of the writ, with no other view but to bring home actual notice to all concerned; and as it respects the mortgagee, here was actual notice independent of the writ.

2. As to the subsequent judgment. The lawmakers had the case of the subsequent purchaser before them, not of the subsequent judgment creditor. The *preamble* is a clear proof of it. It recites that "the provision theretofore made by law for "preventing the risk and inconvenience to *purchasers* of real "estate, by suffering judgments to remain a lien for an inde-"finite length of time, without any process to continue or "revive the same, had not been effectual;" and then it pro-

ceeds to the first enacting clause already mentioned. The *third* section also proves it; for although very precise instructions are given for the service of the writ upon terretenants, purchasers and the like, yet judgment creditors are not mentioned. The preamble to a statute is the key to open the minds of the makers as to the mischiefs which are intended to be remedied; 6 *Bac.* 380. 386., *Plowd.* 369., 1 *Inst.* 79.; and where the not restraining the generality of the enacting clause will be attended with inconvenience, the preamble shall restrain it; 6 *Bac.* 38., *Ryall* v. *Rolle*, (*a*) contrary to lord *Cowper's* opinion in *Copeman* v. *Gallant*. (*b*) Now here unless the enacting clause is restrained by the preamble to the case of *purchasers* only, great inconvenience will follow, and the general intent of the legislature will be defeated. The obvious inconvenience will be this, that after the five years have elapsed, the judgment will not have a lien as against the defendant himself, or persons claiming under a voluntary gift or devise from him; which would be most intolerable. The general intent of the legislature will be defeated, because their object has uniformly been to promote the security of a judgment creditor by confirming his lien, except where it interferes with the circulation of property by embarrassing a fair purchaser. The infallible way to ascertain this intent, is to consider the old law, and the mischief. By the law as it stood before the act of 1798, the lien of a judgment was permanent against all the world. Parties and attorneys were in many cases absent or dead, satisfaction on record could not be obtained where the debt was probably discharged, and satisfactory titles could not be made to purchasers, or they were liable to be surprised by antiquated liens to which their researches had not extended. Hence when the legislature recite the mischief of this old law in the preamble to the act of 1798, they confine themselves to its effect upon purchasers; and by referring to the inefficacy of the provision before made, they shew an intention to provide an additional remedy with precisely the same view with which they had before provided the ineffectual remedy. What was the previous provision? It was the act of frauds

(*a*) 1 *Atk.* 174. 182. 1 *Ves.* 365. (*b*) 1 *P. Wms.* 320.

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and perjuries passed in 1772, which enacted that judgments *as against bona fide purchasers* should bind the lands of the defendant only from the time of being signed, instead of relating as at common law to the first day of the term. The view therefore was exclusively the protection of purchasers. The act of 1798 is a mere supplement to the act of frauds. The one prevents the lien from relating back, the other from travelling onward, to the prejudice of this class of individuals; but judgment creditors are not provided for in either, because they suffered no mischief from the common law. The mischief being thus peculiar to purchasers, the remedy should be so applied as to meet it only, and not to affect a case out of the mischief. The intention of the legislature requires that the law should be so limited; and where this intention can be collected from the cause of making the law, or from other circumstances, it should be followed by the judicial magistrate, even though the letter of the statute be thereby violated. 6 *Bac.* 384., *Plowd.* 205., *Litt. Rep.* 212., *Arthur* v. *Bokenham* (*a*), *The King* v. *The Bishop of London* (*b*). In some cases the *letter* of an act of parliament is *restrained* by an equitable construction, in others it is *enlarged*, in others again the construction is *contrary* to the letter. 6 *Bac.* 386-7., *Plowd.* 465. The intention is the only true guide.

There are many instances in which statutes have been held not to apply to cases clearly within their letter, because their spirit and design did not comprehend them. Cases not liable to the inconveniences of the statute of frauds, are not within it. 1 *Eq. Abr.* 19. A purchaser with notice of a judgment which was not docketed according to the statute of *William* and *Mary*, was nevertheless decreed to pay it. *Thomas* v. *Pledwell.* (*c*) No statute law can exclude all equity. 6. *Bac.* 388., 1 *Roll's Rep.* 500., *Winch.* 123., *Sir W. Jones* 89. *Levinz* v. *Will* (*d*) in our own court, is an express authority for the kind of construction we contend for. Although the act says that an unrecorded mortgage shall not be sufficient to pass or grant any estate, yet it was held to be good between the mortgagee and the creditors of the mortgagor.

(*a*) 11 *Mod.* 161.
(*b*) *Show.* 491.
(*c*) 2 *Eq. Abr.* 684.
(*d*) 1 *Dall.* 430

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So in *The Lessee of Henry* v. *Morgan*, (*a*) an unrecorded deed, which the act of 1775 makes void against *any* subsequent purchaser, was held to be good against a subsequent purchaser under a different title. In *Le Neve* v. *Le Neve* (*b*) the agent of the defendant having had full notice of the first articles made on her husband's first marriage, it was held to be notice to her, and a sufficient equity in the plaintiff to postpone the second articles and settlement, notwithstanding they only had been registered according to the register act of 7 *Ann. c.* 20; yet the letter of the enacting clause, unrestrained by the preamble, clearly defeated the first articles. *Chevall* v. *Nichols* (*c*), and *Blades* v. *Blades* (*d*), are to the same point. So is *Pidge* v. *Tyler*. (*e*) In fact by the same rule of construction which has been applied to the disabling statute of 13 *Eliz. c.* 10., making leases which the statute declares to be void, good during the life of the lessor, 1. *Bl. Comm.* 87., 2 *Bl. Comm.* 321., and to the *Stat.* 27 *Hen.* 8, *c.* 16., making a bargain and sale which can pass nothing by the statute for want of inrolment, good against a subsequent purchaser with notice, this court must restrain the enacting clause to the mischief in the preamble, and decide that the lien continues as at common law against the mortgagee, even if he is a purchaser, since he had actual notice, and against the subsequent judgment creditor, because the law did not intend to alter his situation. Such was the opinion of Judge *Washington* in *Hurst* v. *Hurst*, where he decided the very point now in controversy against the same pretensions as those of the bank, and in support of a lien under the same circumstances as those of the *Hibberts*.*

(*a*) 2 *Binn.* 497. (*c*) 2 *Eq. Abr.* 64. (*e*) 4 *Mass. Rep.* 545.
(*b*) 3 *Atk.* 646. *Ambl.* 436. (*d*) 1 *Eq. Abr.* 358.

3b 347
11 23

* HURST *v.* HURST. Circuit Court of the United States, April 1807.

The money brought into court in this case, was claimed by *Hallowell* for the executrix of *William Brownjohn*, who obtained a judgment against the defendant in 1787, upon which several executions had issued up to *March* 1799, but it had never been revived by *scire facias*.

Rawle contra claimed on behalf of *Wilson*, a subsequent judgment creditor, relying on the act of 4th *April* 1798.

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Arguments for Fuller and the Bank. The object of the legislature is not correctly apprehended. It was not to extend or to fortify the provisions of the statute of frauds in favour of purchasers, but to complete a system which had been long

WASHINGTON J. This is a case of the first impression, and arising out of a state law. I have only to regret that it has fallen to the lot of this court to give a construction to it, before it had been considered and decided upon by the supreme court of this state. A number of cases have been quoted at the bar, which I do not think entirely applicable to this case; but as they seem to have a bearing upon it, it may be proper to notice them; and in doing so, I shall, to save time, arrange them in classes. They were read in order to prove that the enacting clause of a statute may be construed narrower than the words of it import. The statute of inrolments, 27 *H.* 8., gives rise to the first class. The cases under it prove, that though the statute declared that no estate should pass by bargain and sale unless inrolled in six months, yet that the deed is valid except as to subsequent purchasers without notice. The reason of these decisions is obvious. The plain intention of the law was to remedy certain mischiefs which had resulted from the statute of uses, which, by tolerating secret conveyances unknown to the common law, was productive of inconveniences to those who might afterwards become purchasers of the estate, without knowing of such former conveyances. But if the subsequent purchaser had notice of the prior conveyances, the reason for passing the statute did not apply. It would require great ingenuity to give to these cases a shape which could throw light upon that now under consideration. They decide nothing as to creditors, and they depend upon the peculiar circumstances which produced the law upon which they were founded.

Cases upon the statute of *Elizabeth*, to prevent fraudulent conveyances, form the second class. But it is to be remarked, that this statute extends by express words to creditors as well as to purchasers, who are not bound though they purchase with notice; and the reason is plain. The conveyance is fraudulent, and fraud at common law avoids every act. These cases are therefore still more inapplicable than the former.

The third class relates to leases by ecclesiastical persons for a longer term than three lives or twenty-one years. Such leases were considered as void only against the successors, because they alone were intended to be protected by the clear intention of the legislature. These cases only prove that where the intention of the legislature is plain, that intention will control the positive words of a statute,—a position which is not denied, but which as applied to the present case, is a begging of the question in dispute.

The registry act of *Anne* gives rise to the fourth class of cases. That statute avoids all secret conveyances not registered within a limited time, as to subsequent purchasers and mortgagees for valuable consideration. The cases decide that such deeds, though not registered according to the requisitions of the act, are nevertheless good against purchasers with notice. The reason is, that if they have notice, the conveyance is not a secret one and therefore not within the statute.

Next comes a class of cases more apposite to the present, and which

maturing, whose end was the abridgment of those inconvenient liens which the common law of *Pennsylvania* gave to judgments and to debts. It commenced as early as 1715, by requiring mortgagees to enter satisfaction, under a penalty.

will deserve more particular notice. I mean those determined upon the statute 4 and 5 *W & M.* c. 20., for docketing judgments. It declares that judgments not docketed shall not affect lands as to purchasers or mortgagees, or have a preference against heirs and executors so as to affect them. So likewise the statute of frauds 29 *C.* 2., declares that judgments shall be docketed when signed, and that the inrolment of recognisances shall be set down in the margin of the roll within a fixed time; and that as to *bona fide purchasers* for valuable consideration, they shall be considered in law as judgments only from the time they are so set down, and shall not relate. At common law we know that recognisances when inrolled related to the caption, and judgments to the first day of the term. Let us now examine the decisions that have been made upon this statute.

In *Saunders' Reports* 2d vol. part 1st, p. 9. note 6. it is stated, that that part of this statute, which respects the lien of judgments on lands, is applicable only to purchasers and not to judgment creditors, for that purchasers only are protected by the words of the law; that this is the case even as to that part of the statute which respects goods, which is general and does not particularly mention purchasers; and that the law is the same as to judgments under the statute of *W. & M.* except that as to heirs and executors in the administration of the estate, judgments not docketed are considered as simple contract debts. In the case of *Robinson* v. *Longe*, 3 *P. W.* 399., it is said that the statute of frauds concerns *purchasers* only and not *creditors*, who remain as at common law. The case from *Prec. in Chan.* 478., declares in effect the same principle; for a creditor advancing money on the credit of a judgment, may or will stand in a different situation, from a general judgment creditor, since he may (in equity) be considered as a *quasi* purchaser or mortgagee.

I come now to consider the statute of frauds of this state, and the state decisions upon it. This statute passed in 1772, and as to judgments is an exact copy of the *English* statute of frauds. It enacts &c. (*prout.*)

In *Hooton* v. *Will*, 1 *Dall.* 450., the court were unanimous that a judgment related back so as cut out a domestic attachment, which, it seems agreed, lays as firm hold of the land as any lien possibly can. In the case decided in the Common Pleas, no regular judgment was pronounced. In the case of *Welsh* v. *Murray*, 4 *Dall.* 320., it was decided that the judgment first entered must be first paid, which seems to shew that the court considered that the statute of frauds of this state respecting the relation of a judgment applied to judgment creditors as well as to purchasers.

Unless the latter case was decided upon the practice, of which some evidence was given, (and if it were it will prove nothing as to construction, and will therefore be unimportant in the view which I shall take of this case) it will be difficult, nor will I attempt to reconcile it with that of *Hooton* v. *Will.* If the cases are in opposition to each other, I must resort

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1 *St. Laws* 115. It appeared again in 1772 in a restriction upon the relation of judgments, and of course upon the extension of liens. 1 *St. Laws* 640. In *April* 1791, it was carried one step further by requiring judgment creditors who

to the *English* decisions on a statute precisely similar to that of this state, which it appears confine the statute to the case of purchasers, and do not extend to judgment creditors.

This principle being approved and adopted by this court, we come more immediately to the statute under consideration, where the importance of the principle in assisting the construction of the statute will be pointed out. Let it be premised that a literal and strict construction of the enacting clause cannot be insisted upon. It would be too much to insist that a purchaser with notice of *Brownjohn's* judgment, or that *Hurst* the defendant, could take advantage of the judgment's not having been revived in the mode pointed out by the statute. This would be repugnant to the obvious intention of the law. We must then depart in some measure from the letter of the enacting clause. I admit the soundness of the rule laid down by the opponents of *Brownjohn's* judgment, that the preamble is only to be resorted to in order to explain an ambiguity appearing in the enacting clause. But this preamble is worthy of notice, as it refers us to a former law which this is intended to render more effectual. The latter law has indeed been termed by the counsel for *Wilson* a supplement to the former. The preamble requires us to consider it as such, though being in part unaltered, they might and ought to have been considered together, were the preamble out of the question. The law to which we are thus referred is the act of frauds passed in 1772. Taken in conjunction with the law under consideration, we at once discover the mischief and the remedy, not from the preamble alone, but from that and the enacting clause taken together. What was the old law? That judgments should not relate back or be a lien on lands as against *bona fide* purchasers or mortgagees, but from the time they were signed and inrolled. The mischief which notwithstanding this law still existed, was, that after a great length of time purchasers might find it difficult to discover what judgments were outstanding, so as to affect the land they wished to purchase. The lien extending to all the lands of the debtor, no person could safely know what part he might safely purchase. To remedy this evil the last law requires the judgment creditor within five years to sue out a *sci. fa.* and to give such public notice of its existence that all the world may know what and where the judgment is.

But who are the persons for whom this additional remedy is provided? Surely those in favour of whom the former law had been made, but which was found not to be effectual. To extend the law to other persons would be repugnant not only to the preamble, but to the enacting clause also. If we are to consider the two laws together, which is certainly proper, it would provide a remedy where none was intended. How then do the two laws read taken together? Judgments shall be inrolled at the time they are signed, or they shall not by relation affect a *bona fide* purchaser or mortgagee; and as to *such persons* the lien of the judgment creditor shall

had been satisfied, to enter satisfaction of record. 3 *St. Laws* 96. In 1794 sales by order of orphan's courts were declared to be discharged in the hands of purchasers, from debts of the deceased. 3 *St. Laws* 521, *sec.* 20, 21. In 1797 debts of an intestate which had before been a permanent lien upon his lands, were expressly deprived of their lien after seven years, unless a certain process was adopted by the creditor. 4 *St. Laws* 155. And finally in 1798 came the law in question, cutting off by the most express language the lien of all judgments unless revived every five years by *scire facias*. 4 *St. Laws* 300. It is clear therefore that the legislature did not in the preamble to the act of 1798, refer only to the provisions in the act of frauds, but to the whole system of provisions, and if to any one part more than to another, to the act of *April* 1791, one of whose sections required satisfaction to be entered upon the record of all judgments which had been paid, not for the sake of purchasers only, but for the

cease, unless the judgment be revived in five years by a *sci. fa.* This reading produces a perfect harmony between the old and the new law. That this was the intention of the law is further manifested from the 3d section of it, which noticing those who may be interested, directs the *sci. fa.* to be served on the debtor or his representatives, his alienee and terretenants. If the judgment creditor had been an object of the law, and intended to be protected by it, why not have directed the writ to have been served on him, who might as easily have been found as the alienee?

I think it not improper to make some general observations on the cases which I before noticed under classes. In not one of them are creditors noticed except in the following instances. 1. Those under the statute of *Elizabeth* against fraudulent conveyances, and in that creditors are specially mentioned. 2. Where the creditor is considered a *quasi* purchaser, as where he advances money on the credit of the judgment, trusting to that as his security without notice of the judgment; *Prec. Chan.* 478.; and that this decision is closely observed, appears from those decisions in equity which establish *even an agreement to sell land* against a judgment creditor, and which prevent a prior judgment creditor from tacking it to a subsequent mortgage, though in the first case the agreement would not prevail against a mortgage, and in the latter a prior mortgagee obtaining a subsequent judgment may tack the latter to the former against an intermediate incumbrancer. *Finch* v. *The Earl of Winchelsea.* 1 *P. Wms.* 278., 2 *Vez.* 622-3. The reason is plain. The judgment though a lien is not a *specific* lien on the land; that is, the creditor did not go on the security of the land, but trusted to the general credit of the debtor and of his estate.

I am therefore of opinion that the judgment of *Brownjohn* must prevail against the other judgment creditors.

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sake of defendants themselves; and it being found that satisfaction could not be entered in many cases, the intention was to supersede this form by taking away the lien.

By this construction all parts of the law harmonize. The title itself shews it to be an act of limitation. "An act limiting the time during which judgments shall be a lien on real "estate" &c. The preamble, by reciting that the provisions made by law for preventing risk and inconvenience to purchasers had not been effectual, does not mean merely that they had not been effectual for purchasers, but effectual for all necessary purposes whether concerning purchasers or other persons; as in case of a sale under execution, not only purchasers were embarrassed, but it was impossible to know to which judgment creditor the proceeds should go, while so many antiquated judgments were upon the docket. And then comes the enacting clause, free from the least ambiguity or obscurity, that no judgment shall remain a lien for a longer term than five years, unless revived by *scire facias*. It is not surprising then that the arguments should not apply, and that even the decision of judge *Washington* should be erroneous, when the object of the law has been mistaken. Notice was not the thing required. Judgments were often known, when the plaintiff and his attorney were dead, and the debt discharged. They nevertheless impeded public sales. They called for vexatious inquiries. They were sometimes kept open by fraud, to guard a defendant against a younger judgment. They imposed upon every purchaser at sheriff's sale the necessity of examining the records of the court to their very origin. And hence the legislature required every five years the most decisive evidence that the judgment was unsatisfied and in force, by demanding its revival after full notice to all concerned. A main object was to limit the searches of conveyancers to five years.

But it is said that the preamble, since it speaks of *purchasers* only, must be held to restrain the enacting clause. The very authority cited shews that the particular words of the preamble never are permitted to restrain the generality of the enacting clause, unless there are other weighty reasons.

The preamble is no more than a recital of some inconveniences, which does not exclude others. 6 *Bac.* 381. If part of

a statute is obscure, it is to be elucidated by other parts, and restrained or enlarged according to necessity. But the mere particularity of the preamble is no guide. To say that inconvenience will result from not restraining the enacting clause, is begging the question. The legislature as has been shewn, intended it to be general. If not, why omit the words, "*as against purchasers*" which had been inserted in the act of frauds? There are many cases where the enacting clause goes beyond the preamble; so many indeed that the preamble can scarcely be called a key to the legislative intention. Where the law is plain, the legislature must be intended to mean what they have expressed. *United States* v. *Blight*. (*a*) It would be a precedent full of danger, if in such a case as this, the preamble were to overturn the enacting clause.

This argument is also an answer to the objection that the law intended to leave all parties in the relation they bore at its date, and only to affect cases arising at the end of five years. It does not say so. The language is clear to the contrary. *No* judgment *then* on record, was to retain its ien more than five years, unless revived. In fact the objection recoils upon the *Hibberts*. The circumstance of comprehending all judgments past and to come, shews that notice was not the object. They were all within one common mischief, that of embarrassing creditors as well as purchasers.

None of the cases cited support the argument of the opposite counsel. They arise under 1. The statute of inrolment, 27 *H.* 8. *c.* 16. 2. The statutes relative to church leases. 3. The statute of 27 *Eliz. c.* 4. 4. The registering acts, or 5. The docketing act of *William & Mary*.

1. The statute of inrolments resembles this more than any other, because it does not mention the class of persons to be affected, but enacts that a bargain and sale without inrolment shall not pass any estate. And so it has uniformly been held against all parties. It is not conceded that under the statute 27 *H. c.* 16. deeds not inrolled are valid against purchasers with notice. By inrolment they no doubt have relation to the date. 1 *Com. Dig.* 541 *D.* But if *A* bargains and

(*a*) 2 *Cranch.* 399.

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sells to *B*, and they grant a rent to *C*, if there is no inrolment in six months, it is the grant of *A* and the confirmation of *B*. 1 *Inst.* 147 *b*. Without inrolment nothing passes. *Moor* 34. *pl.* 113. 40. *pl.* 128. The bargainee cannot distrain for damage feasant. *Saville* 91. He is not a good tenant to the præcipe. *Hobart* 261. *Robinson* v. *Comyns*. (*a*) He cannot maintain waste. *Hynde's case*. (*b*) He cannot support an ejectment. 2 *Roll's Rep.* 119, 120. If either pleadings or special verdict set out the bargain and sale without an inrolment, it must be held that nothing passed; so that the conveyance is void at law. *Yelv.* 217., 2 *Saund.* 11, 12., *Hob.* 262. If in any case equity steps in, it is only where a subsequent purchaser has notice of the deed, and then it is a fraud in him to oppose the bargain and sale for want of inrolment, and to endeavour to defeat the bargainee. But what emphatically differs this kind of case from the present, is the notoriety of the fact that the 27th *Hen.* 8. *c.* 16. was passed solely to guard against the mischiefs of secret conveyances which were likely to result from the statute of uses passed in the same session. Notice therefore was its only object.

2. The statutes relative to church leases, 13 *Eliz. c.* 10., and 18 *Eliz. c.* 12. The objects of these statutes was to prevent frauds against the *successors* of ecclesiastical persons. The title of the first and its two first sections most distinctly shew it; the other statute proceeds upon the same ground, and with the same view. Hence the restriction of the remedy to the mischief. To have allowed the lease to be defeated during the life of the lessor, would have made the statutes an inducement to fraud.

3. The statute against fraudulent and covinous conveyances, 27 *Eliz. c.* 4., was made expressly for the protection of purchasers. And being so, whether they have notice or not is immaterial. The conveyances are equally void. 1 *Fonbl.* 268.

4. The registering acts 2 & 3 *Ann. c.* 4., 6 *Ann. c.* 35., 7 *Ann. c.* 20., 8 *Geo.* 2. *c.* 6., by their enacting clauses make unregistered deeds void as against subsequent purchasers and mortgagees for a valuable consideration. The exclusive ob-

(*a*) *Cas. Temp. Talb.* 167. (*b*) 4 *Rep.* 71

ject of these acts was notice; but notwithstanding this, it is on the ground of fraud that equity makes the unregistered deed good against the subsequent purchaser. *Chevall* v. *Nichols*, and *Blades* v. *Blades* were cases in which the second purchaser was postponed in equity on the ground of fraud. It is a fraud in a second purchaser, having notice of a prior unregistered deed, to register his deed first. *Worsley* v. *Dematos*. (*a*) But in our case there is no pretence of fraud, or even of taking any advantage of the *Hibberts*.

5. The docketing act of 4 & 5 *W.* & *M.* c. 20. was also made exclusively for the benefit of purchasers and mortgagees, and its object was notice. Yet still equity inforces a judgment not docketed as against a subsequent purchaser, only on the ground of fraud. *Thomas* v. *Pledwell* was a case in which the purchaser had been expressly allowed for the judgment which he endeavoured to defeat.

There is no case which is an authority for postponing us to the first judgment under such a law as this. In fact as it respects the mortgage we are within the preamble as *purchasers*. *Chapman* v. *Staverton* (*b*), *Gilb. Lex Præt.* 230. *Finch* v. *Earl of Winchelsea* (*c*), *Brace* v. *the Dutchess of Marlborough* (*d*), *Anon.* 2 *Ves.* 662. *Taylor* v. *Wheeler* (*e*). And indeed in equity any man who trusts his money upon the lien of a judgment is in some sort a purchaser. *Prec. in Chan.* 478. In *Levinz* v. *Will* it was conceded by counsel, that if any one had obtained a judgment *bona fide*, it would have been preferred to the unrecorded mortgage.

Cur. adv. vult.

On this day the judges delivered their opinions, as follows:

TILGHMAN C. J. The money brought into court in this case, is claimed by three different parties; by *Samuel* and *William Hibbert*, by the Bank of North America, and by *William Lewis* executor of *Benjamin Fuller* deceased. But the question submitted to the court is, whether the *Hibberts* are intitled to the payment of their debt. The Bank and the executor of *Fuller* do not wish to have it decided which

(*a*) 1 *Burr.* 474. (*c*) 1 *P. Wms.* 277. (*e*) 2 *Vern.* 564.
(*b*) *Cowp.* 280. (*d*) 2 *P. Wms.* 491.

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of them is intitled to the preference. It will be sufficient, therefore, to consider, how the case stands between the *Hibberts*, and the executor of *Fuller*. This will depend on a single point, that is to say, whether the provision in the first section of the act of 4th *April* 1798, limiting the lien on real estate, of judgments *then* in existence, to the term of five years from the passing of the act, is to be confined to the case of *purchasers*, or operates also in favour of *judgment creditors*.

The act is intitled "an act *limiting* the time during which "judgments shall be a lien on real estate, and suits may be "brought against the securities of public officers." The preamble recites, that "the provision heretofore made by law "for preventing the risk and inconvenience to purchasers "of real estate, by suffering judgments to remain a lien for "an indefinite length of time, without any process to con-"tinue or revive them, had not been effectual." By the first section it is enacted, that no judgment *then* on record, should continue a lien on the real estate of the defendants, during a longer term than five years from the passing of the act, unless revived by *sci. fa.* within the said five years. The second section enacts, that no judgment to be *thereafter* entered in any court of record, should continue a lien for a longer term than five years from the first return day of the term of which it was entered, unless revived by *sci. fa.* within the said five years. The third section points out the mode in which the *sci. fa.* shall be served.

The plaintiff's counsel contend that the preamble of the act shews, that purchasers only were in the contemplation of the legislature, and therefore none but purchasers shall derive any benefit from it. In support of this construction a number of cases were cited, establishing principles of which it will be necessary to take notice. The cases may be reduced to the following heads. 1st. Rules for the construction of statutes. 2d. Leases made by ecclesiastical persons. 3d. The statute of inrolments, 27 *Henry* 8. *c.* 16. 4th. The statutes concerning the registering of conveyances of real estate.

As to the construction of statutes, it is certain they are not always to be construed according to the *letter*. General expressions may be restrained, where it clearly appears from the whole law, that it was the intention of the legisla-

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ture to provide a remedy only for particular cases. Upon this principle the cases which relate to leases made by ecclesiastical persons turned. The statute 13 *Eliz. c.* 10. *s.* 3., provides, that all leases &c. for more than twenty-one years or three lives shall be utterly void and of no effect, to all intents constructions and purposes. Yet it has been held, that such leases were good during the lives of the persons by whom they were made, because it was the intent of the legislature only to protect the *successors* of such ecclesiastical persons. To bring those cases to bear on the point in question, it must be shewn, that it was the clear intent of the legislature to confine the remedy against the lien of judgments, to purchasers of real estate.

The cases on the statute of inrolments, and on the registering acts, may be considered in the same point of view, as they depend on one and the same principle. By the statute of inrolments, no estate of freehold or inheritance, or any use thereof, shall pass by deed of bargain and sale, unless the deed is recorded in six months from the date. By the registering acts, deeds not registered according to the provisions of the several acts, shall be adjudged fraudulent and void, against any subsequent purchaser or mortgagee for valuable consideration, unless such prior deeds are registered before the registering of the deeds under which such subsequent purchasers or mortgagees claim. Now it is settled that if a purchaser neglects to inrol or register his deed according to the provisions of these statutes, yet his title shall be established, in equity, against a subsequent purchaser who at the time of his purchase had notice of the prior uninrolled or unregistered deed. The reason is, that those statutes were made for the protection of purchasers against secret conveyances, and therefore purchasers *with notice*, are not within the mischief intended to be remedied. Besides, such purchasers do not act fairly, and it is principally on the ground of *fraud*, that courts of equity interfere in such cases. It is a fraud for a man who has sold land, to endeavour to circumvent the purchaser and deprive him of his property, because he has been so negligent as not to inrol his deed; and it is fraud for any third person to aid the seller in this circumvention, by making a subsequent purchase. Such subsequent purchaser cannot be called a *bona fide* pur-

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chaser, though he pays the full value of the land. On the contrary he acts *mala fide*, because he is party to a transaction by which his neighbour is defrauded. Such are the sentiments of lord *Hardwicke* in *Le Neve* v *Le Neve*, *Ambler* 446, and the good sense of them is manifest. The plaintiff therefore can make no application of these cases, unless he shews, that the youngest judgment creditor has acted fraudulently towards the eldest.

I will now consider more particularly the act of assembly on which the question arises, for after all it is that which must govern us. From its title it appears to be intended as an act of *limitation*, and that I take to be its true meaning. I cannot agree with the plaintiff's counsel, that the only object was, to prevent the injury which *purchasers* might receive from judgments of which they had *no notice*, because all judgments are of record, and every man may obtain information of them. But the lien of old judgments produced great inconvenience to persons who *had notice* of them. In many cases the plaintiffs had been long dead, or lived at a great distance, and although part, or the whole of the debt had been paid, this did not appear on the record. The mischief was not confined to purchasers of the real estate bound by the judgment; and that is a very material consideration in investigating the intent of the legislature. It has been a practice of long standing in this state, when the sheriff sells land by virtue of an execution, to sell it for its *full value* without regard to the lien of judgments, and to apply the purchase money to the discharge of those liens, according to their order. Now great difficulty arose in discharging those liens, for the reasons which I have mentioned. The consequence was, that the sheriff retained the money in his hands till he could ascertain the amount of old judgments, and this was a great injury to judgment creditors in general, as well as a great embarrassment to sheriffs who wished to act honestly, and pay away the money as quickly as possible. The title of the act of assembly is calculated to prevent these mischiefs, and so is the enacting part of the first and second sections. Nothing can be more general or more plain, than the expressions in these sections: " no judgment shall continue " a lien on real estate during a longer term than five years,

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unless revived by *scire facias*." Why then are these general words to be restricted to the case of purchasers? Because, it is answered, the preamble makes no mention of inconvenience to any but purchasers. I am not satisfied with this reason. The intention must be clear to authorize the restraining of the enacting clauses. I cannot say that the intent is clear, when I find the title more comprehensive than the preamble, and when we all know that nothing is more common than to *recite* a particular mischief, and to *provide* remedies for other mischiefs. Will any inconvenience result from construing the general expressions according to their natural import? No, but on the contrary it will promote the public convenience. It may be remarked, that this preamble which is so much relied on, is expressed in very vague terms. It speaks of former provisions by law, in favour of purchasers, which had proved ineffectual, but does not point out what those provisions were, or in what laws they were contained. The plaintiff's counsel suppose that the former provision alluded to, was made by the act for prevention of frauds and perjuries, 21st *March* 1772, 1 *St. Laws* 640, by which, judgments *as against purchasers bona fide for valuable consideration* do not bind lands, but from the time of their being *signed;* indeed it has been contended, that the act upon which the question before us arises, is to be considered in the nature of a supplement to the act of frauds and perjuries. This is carrying the matter too far. When the act in question was made, no doubt there was an eye to the act of frauds and perjuries, and one of my reasons for thinking that the provisions in the former were not intended to be confined to purchasers, is, that the enacting clauses do not so confine it, whereas the act of frauds and perjuries is expressly restrained *to purchasers bona fide for valuable consideration*. But the act of frauds and perjuries does not appear to be the only one alluded to, in the preamble of the act in question. A provision was made by the act of 19th *April* 1794, that purchasers of lands sold by order of Orphan's Courts, should hold them discharged from liens, and all debts of the intestate, judgments included. By the act of 4th *April* 1797, debts due from deceased persons (other than debts of record) are not to remain a lien on lands for more than seven years from the decease of the

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debtor, unless certain things are done which are specified in the act. Though this last act does not relate to judgments, yet it serves to shew, in connexion with others, that the current of legislative opinion has been for some years against long continued liens on real estate, from an experience of their inconvenience.

Now to bring these observations to a point, we are considering an act of assembly, of which there are two modes of construction. One agreeing with the plain and natural meaning of the enacting words, and the intent expressed in the title, going *beyond*, but not *contradicting* the recital in the preamble, and at the same time the best calculated to promote the public convenience; the other, contrary to the common meaning, and restraining the import of the general expressions of the enacting clauses, in order to comply with the supposed intent manifested in the preamble. I prefer the former construction, and I have considered it fully, not only on account of the importance of the subject, but from my high respect to the Circuit Court of the *United States* for this district, who have entertained a contrary opinion. I shall always differ from that court with great regret, and particularly in cases which arise on the construction of our own acts of assembly, because there is no superior tribunal by which the law may be settled.

My opinion is that *Samuel* and *William Hibbert* are not intitled to any part of the money.

YEATES J. gave no opinion, being interested as a stockholder in the Bank of North America.

BRACKENRIDGE J. "An act limiting the time during "which judgments shall be a lien on real estate," is that part of the title of the act of the 4th *April* 1798, which respects the present question. The preamble states, "That whereas the "provision heretofore made by law for preventing the risk "and inconvenience to purchasers of real estate, by suffering "judgments to remain a lien for an indefinite length of time "without any process to continue or revive the same, hath not "been effectual, therefore," &c. We are led to inquire, what provision had been made by law in this particular? I find nothing in the act of 1772, intitled an act for the prevention

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of frauds &c., that has any relation to the *duration of the lien of a judgment*, but only to the taking away *the fiction of relation*, "to the first day of the term at which it was entered, "or return of the original, or filing of the bail." The law of 13th *April* 1791, 3 *St. Laws* 96. *sec.* 14., which has been cited, introduces no limitation of a judgment; but, by the preamble to the section, we discover the mind of the legislature, on the *mischief* of judgments continuing a lien an indefinite length of time: that "whereas it frequently happens, that judgments "long remain *unsatisfied* on record, although the *moneys for* "*which these judgments have been rendered are justly dis-* "*charged*, whereby defendants in such case, as well as the "subsequent *purchasers* of real property, suffer much vexa- "tion, and inconvenience, be it enacted," &c. The provision, under this law, regards the compelling the judgment creditor, at the request of the defendant, to enter satisfaction within eighty days after request made, under penalty of paying "any sum of money, not exceeding one half of the "debt or damages" in the judgment.

This is the only provision made by law in the case, before the act in question, to the construction of which we now come.

To what purchasers shall it be considered as relating? Shall it be to all that acquire an interest in the real estate, whether *absolute* or *special?* Is not the one as much a purchaser as the other, though he does not acquire the same interest? A judgment creditor has trusted his money, or money's worth, and obtained this security. The judgment not being satisfied, he proceeds to carry his *purchase*, as it may be called, into effect. Indefinite as to extent in the case of a judgment, it is rendered definite by a levy. The sale by the sheriff, the agent of the law for both debtor and creditor, in the case of a mortgage or judgment, is for the use of the creditor; and the deed by the sheriff completes the transfer of a property vested in equity before for his use.

In the case of the mortgagee, or subsequent judgment creditor, I am not able to see the application of the argument relative *to notice*. The record of the prior judgment is a lien; and notice or not notice, binds. An interest is acquired by the subsequent alienee, mortgagee, or judgment creditor; but

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subject to the prior judgment, whether this alienee mortgagee or judgment creditor knows of the prior lien, or does not know of it. If actual notice could be more than constructive here, how shall it be established? By a copy of the docket entry served upon the party? But there can be no party prior to the acquiring an interest; and after acquired, it cannot affect. Constructive notice bound before, as much as actual notice, were it proved. But actual notice that it *was not satisfied*, is the notice spoken of. This, the record of a judgment, without satisfaction entered, of itself imports. It would introduce a new chapter on the subject of notice, that a judgment was not satisfied, which it purports not to be, until the contrary appears. But it will be said, the owner of the subsequent lien may acknowledge that he knew the former was not satisfied: and what then? There was no *dolus malus* in him in taking his lien subject, as by the law it was, to the prior. The *caveat emptor* lies upon the purchaser, and he is subject to the *inconvenience* of finding out what liens are of record, and the risk of not discovering all; and without the intervention of an act of the legislature, he was subject to the lien, whether he discovered it or not; but in his research it would be his misfortune not to have discovered it.

This brings us to the question, has the act of assembly exonerated the property? Can the legislature be supposed to have intended a dissolution of the lien, so as to exonerate from the prior incumbrance? Will it not be sufficient to construe it as extending to alienations or incumbrances, posterior to the five years? Say a mortgage or a judgment after the five years and before the alienation contemplated, how will it stand with a mortgage or judgment immediately preceding the five years? Will that be subject to judgment No. 1? No. But it will be subject to judgment No. 2, five years not having elapsed on that judgment. But can judgment No. 2 be discharged without discharging No. 1 subject to which it was taken? The argument for *Hibbert* must say no. Then if No. 3, after the five years, is subject to No. 2; and No. 2 is subject to No. 1, No. 3 is subject to No. 1. Exoneration from one, and not the other, is like the *Welsh* carrier mounting his beast, and taking the cheese upon his own back to lighten the bur-

then. It involves an inconsistency to suppose that the act can look forward only to incumbrances posterior to the five years; and what is there then, in supposing the legislature to intend a limitation to the duration of the lien, and an exoneration of the property to all intents and purposes, more than in any other act for quieting possessions, and limiting the pursuit of titles? A principle of the artificial system of the law gave the lien, and the law may think proper to dissolve it. *Omne solvitur eo ligamine quo ligatur.*

This statute has a retrospective effect, it is true; but there seems to be no constitutional objection justly founded, to the power of the legislature to enjoin such conditions, as may let in the rights of others, whether by accelerating the obtaining satisfaction, or getting an entry of satisfaction made upon the record so that the preceding lien may be out of the way. It is the language of the law, satisfy yourself, or say you are satisfied, that another may come in. Why stand in his way that he cannot tell what to do? *Sic utere tuo, ut alienum non lædas.*

In order to comprehend the meaning of this act we must look, as I have said, to the law to which it refers; and which is not the act of 1772, which respects the *relation* of a judgment and nothing more, but the act immediately preceding on this subject, the act of 1791. At common law if a judgment sleep *post annum et diem*, it is necessary to revive it by a *scire facias*, before an execution can issue. This, on the presumption that it is satisfied. By the present act, if a judgment sleep five years, the presumption is considered as arising of its being satisfied, so far as to exonerate the lien, though it does not annihilate the debt. It still leaves to this a right of recovery, but not as a lien on the real estate. It is impossible that the words of the act can be broader, or embrace more extensively. "No "judgment *now* on record in any court within this com- "monwealth, shall continue a lien on the real estate, unless" &c. And section 2, "No judgment *hereafter* entered in any "court of record shall continue a lien on the real estate, "unless" &c.

But why the *scire facias*, served, as provided in sec. 3, "on "the terretenants or persons occupying the real estates bound

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"by the judgment, and also, where he or they can be found, "on the defendant or defendants, his or their feoffee or "feoffees, or on the heirs, executors, or administrators of "such defendant or defendants, his or their feoffee or feoffees; and where the land or estate is not in the immediate "occupation of any person, and the defendant or defendants, "his or their feoffee or feoffees, or their heirs, executors, "or administrators cannot be found, proclamation shall be "made," &c.? Unless sufficient cause to prevent the same is shewn at or before the second term subsequent to the issuing of such writ, the court shall direct and order the revival of any such judgment during another period of five years, and so *toties quoties*. Why this? I answer: The object of this act was to get the docket cleared or kept down as to the list of judgments which a purchaser must inspect; and as to which being satisfied or not satisfied, he must inquire. It awakened debtors, for *their own sakes*, to have satisfaction entered, which in the case of the loss of evidence might not be easy to make out; especially in the case of executors and administrators, who were embarrassed by the claims of priority of lien; for the sake also of those deriving title under the debtor, by alienation from himself immediately, and who were interested in having satisfaction entered on judgments of which they might not have been aware, or which had been represented to them as having been in fact satisfied. It facilitated to a debtor the compelling the entering satisfaction in his favour, by rendering it penal to the creditor himself, to the extent of the loss of the whole of his lien. But a principal and leading object was *for the sake of the judgment creditors, as between themselves*.

A precise view of the mischiefs that existed before this statute in the case of the lien of a judgment, will be the best exposition of its object, and the extent of its application. A creditor who had a judgment in his favour, say No. 2, was delayed by No. 1 not proceeding to a levy, or sale, so as to ascertain the effect of his lien, and leave the subsequent judgment open to his proceeding. For if he proceeded, a sale under his judgment must be subject to the prior judgment which was perhaps satisfied, but did not appear to be so.

It was not an uncommon thing, that by collusion of cre-

ditor No. 1 with the defendant, this judgment was kept open, notwithstanding satisfaction before actually made; and on a sale under the judgment No. 2, it was brought in, and the debt claimed. A defendant having become *insolvent*, could serve himself by a fraud of this kind. He could say to the judgment creditor No. 1, claim your judgment which I will not call upon you to acknowledge satisfied, and which I will not allege has been satisfied. Claim your debt, or do not come forward to enter satisfaction, that at the sale under it, or under No. 2, subject to it, a friend of mine may purchase *for my use*. But laying this out of the case, the judgment creditor knowing nothing of the fraud, his judgment may answer the purpose of depreciating the sale of the property; and without the knowledge of either creditor or debtor, this use has been made of outstanding judgments by *speculators* at the sheriff's sale, by which means the judgment creditors are defrauded, the property not bringing the real value. What was more common than for speculators in this way to buy up a prior lien satisfied in whole or in part, to make this use of it, and get the property at an under value, which could not have been done if the judgments had been cleared away that were actually satisfied, though apparently existing.

There is an air of vexation in the preamble of this act, at the finding it necessary to make any other provisions than those already made. Would it not justify a greater irritation of the public mind, if by a restrained construction of the word *purchaser* in the preamble, the broad provisions of even this act were defeated?

I can therefore have no doubt, that even as respects judgment creditors, with relation to liens between themselves, the prior judgment not revived according to the act, loses its priority. But here as between the prior judgment and the mortgage, which it is not denied comes in strictness under the denomination of a purchase, the argument can only be on the ground of notice, which the mortgagee will and must admit he had. And what then? It cannot affect. If it could be made a consideration, it is not the notice of the lien, but of the *non satisfaction*, that could affect; and this is the ground of the whole mistake in the argument on the point

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of notice. But even did he know that the prior judgment was not satisfied, it interferes with the policy of the law to relieve him against it. I must therefore be of opinion that *Samuel* and *William Hibbert* are not intitled *to the payment of their debt out of the amount of the sales under the mortgage.*

WELLS administrator of CRAIG *against* TUCKER and wife.

Philadelphia, Saturday, March 30.

The delivery of a bond or personal chattel by the owner in his last illness to his wife, for the use of a third person, is a sufficient delivery to make it a good *donatio causa mortis.*

The widow is a good witness to prove a *donatio causa mortis* by her deceased husband.

A bond is a proper subject of a *donatio causa mortis.*

It seems that a *donatio causa mortis* is not only conditional, to be void if the donor recovers, but it is also revocable by him, being in the nature of a legacy.

THIS was an action of trover for two bonds, tried under the general issue at the *Nisi Prius*, in *February* last before Mr. Justice *Yeates*.

From the report of his honour, the evidence was in substance this:

Andrew Craig the intestate, had adopted the wife of *Tucker* at a very early age, and maintained her in his house until her marriage. After that event, he frequently manifested his kindness to her family, and in one or two unfinished wills which he left at his death, appeared to have designed a legacy of about 1000*l.* for her husband and children. He died on the 20th *August* 1805, intestate and without issue, leaving a widow, a brother and sister, and some nephews and nieces the children of deceased brothers and sisters. His *widow*, who by the law of *New Jersey* where he had lived, was intitled to half his personal estate, proved upon the trial, that about the 17th of *August* 1805, her husband, having then a sketch of a will in his hand, which he was too ill to finish, said to her, "I have bonds against *Benjamin Tucker* "(the defendant) to the amount of about 1000*l.*, which I "give to his children to be divided between them." He told her where they were, wrapt up in the pigeon-hole of a desk, of which he delivered her the key, and requested her to go and get them. She accordingly got them and locked them up until after his death, when she delivered them to the defendants. After the delivery, *Tucker*, imprudently, but not with any dishonest view, cancelled them, and induced the

original obligee, who had assigned them and a mortgage for securing them, to the intestate, to enter satisfaction of record.

Judge *Yeates* charged the jury, that if they believed the evidence of Mrs. *Craig*, they ought to find for the defendants, as he was of opinion that the delivery of the bonds to the wife for the children, made them a good *donatio causa mortis*.

The jury found for the defendants; and now upon a motion for a new trial,

Ingersoll for the plaintiff contended, 1. That the verdict was against evidence. 2. That the judge misdirected the jury, inasmuch as a delivery by the husband to his wife was not sufficient to constitute a valid *donatio causa mortis*.

Upon the first point the argument is not material. On the second he argued, that this gift wanted an essential requisite to make it valid, and therefore the plaintiff was intitled as administrator. The bond he conceded was a proper subject of this kind of gift, though it was formerly held otherwise. 3 *Woodeson* 513-14. But delivery he said was essential, such a delivery as the donor could not recal. *Ward* v. *Turner* (*a*), *Drury* v. *Smith* (*b*). A donation *causa mortis* is subject to but one condition, the restoration of the donor to health. It is not revocable by him, and therefore an irrevocable delivery is of the essence of the gift. Were it not so, these gifts would entirely defeat the statute of wills, and would lead to endless litigation and perjury. They are not subject even to the rules which regulate nuncupative wills; and they are therefore the most dangerous of all dispositions of property. It cannot be surprising then that the law watches them with great jealousy, and that where there is not a gift which transfers the possession, the donation is ineffectual. *In mortis causa donatione, dominium non transit sine traditione. Voet on the Pandects, lib.* 39. *tit.* 6. *num.* 3. 6. There is no case which comes up to this. A delivery to a servant to give to a wife may be good, as in *Miller* v. *Miller*, (*c*) because the delivery to the servant is absolute; but a delivery to the wife for a third person is not so. She is *sub potestate viri*, and he may at any time countermand his gift; in fact the posses-

(*a*) 2 *Ves.* 431. (*b*) 1 *P. Wms.* 404. (*c*) 3 *P. Wms.* 356.

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sion in such a case does not change hands. To say that it is in nature of a testamentary disposition, and therefore revocable, and from thence to argue that absolute delivery is not necessary, begs the question. It is not a testamentary disposition. If it were, the law would not permit one witness to sustain it. So it is a fallacy to say that the wife may accept livery of seisin for, or deliver it to her husband, because still the question recurs, is she not in point of law subject to the authority and commands of her husband? It is not easy to discern the use of a delivery except to prevent a countermand. It is true, that a delivery to the wife for her own benefit is said in one case to be good. But as to property, the wife is in equity considered as a *feme sole;* not so, as to her subjection to the husband's authority. It will be a most dangerous precedent to establish, that a wife, upon her single oath, and so ambiguous a delivery as this, may set up donations by her husband to defeat the next of kin. It will be a complete overthrow of all the statutory precautions in relation to written and nuncupative wills.

Hallowell and *Rawle contra.* The testimony of Mrs. *Craig* was decisive as to the facts, if she was believed; and no one could disbelieve her who saw her manner of giving testimony, and recollected that she was speaking against her own interest.

The point of law is almost equally clear. No doubt delivery is essential, but a valid delivery was made to the wife. The danger of these gifts is not the question, but whether the law has authorized them under the present circumstances. It authorizes the wife to act so far like a *feme sole* as to deliver seisin to her husband; *Co. Litt.* 52 *a; a fortiori* she may deliver seisin to a stranger for him. She may act as executrix to a third person. She may be attorney for her husband. Why then is not a delivery to her for a third person good? It is answered, because it is revocable. So is every such gift. In *Jones* v. *Selby*, (*a*) it is said by the Lord Chancellor to have been conceded by counsel. It is a consequence of its testamentary character, which runs pretty generally through it, making it even liable for debts, though it

(*a*) *Prec. in Chan.* 300.

would not be if a *donatio inter vivos*. *Ward* v. *Turner*. (*a*) It is further said that the wife is under the husband's authority, and he therefore may countermand. That does not follow. If the husband makes his wife an attorney for the benefit of a third person, he cannot countermand. In *Miller* v. *Miller* the donation was to a servant for the wife who was present, and he handed it over to her immediately; yet it was held good. In *Lawson* v. *Lawson* (*b*) the husband gave a purse to his wife for her own use, and it was held good. And in *Drury* v. *Smith* the gift was supported, though to a third person for the use of an absent donee. Now if a delivery is good though made to one person for another, and if the wife may be either directly or mediately the donee, what sound reason can there be against her being the person to whom the delivery is made, and a friend or relation the donee? If she is *sub potestate viri* as to the possession, so must she be as to the property. If the former may be revoked, so may the latter. If she cannot take to deliver over, she cannot take to hold. Danger there may be in some cases. It is the duty of judges and juries to watch this kind of gift. But it never can be dangerous where, as in this case, there is clear evidence of a fixed purpose of bounty in the donor towards the donee, and the gift and delivery are supported by a witness against her own interest.

TILGHMAN C. J. This is an action of trover for two bonds which were the property of *A. Craig* the plaintiff's intestate. The defendants claim them as a *donatio causa mortis* made by *Andrew Craig* in his last illness to the children of the defendants. *Andrew Craig* died intestate, and without issue, and the gift was proved by *Theodosia Craig*, his widow, who is intitled by law to one half of her husband's personal estate. She swore, that the gift was made by her husband about three days before his death, and the bonds delivered to her, to be by her delivered over, and that she kept them locked up in her trunk till after the death of her husband, when she gave them to the defendants for the use of their children.

The first reason offered for a new trial, is that the verdict

(*a*) 2 *Ves.* 434. (*b*) 2 *Equ. Abr.* 575.

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was against evidence. But this does not appear to have been by any means the case; for the witness who proved the gift was of irreproachable character, and swearing against her own interest. Her credibility was submitted to the jury, and I cannot say that they were wrong in believing her.

The second reason for a new trial is, that there was no *delivery* of the bonds, which is essential to a gift of this kind; that a delivery to the *wife*, was, in point of law, no delivery at all, and that the judge who tried the cause erred in not charging the jury accordingly. This is the only point for consideration.

A *donatio causa mortis* is a gift of a personal chattel, made by a person in his last illness, subject to an implied condition, that if the donor recovers, the gift shall be void. So also it shall be void, if the donee dies before the donor. In this and some other circumstances (being subject to the debts of the donor &c.) it is in nature of a legacy. It was introduced into the common law from the *Roman* civil law, but not in the full extent in which it is recognised in the latter. The civil law takes notice of three different kinds of *donationes mortis causa*, to some of which delivery is essential, but not to all. It is unnecessary to inquire minutely into the civil law, because I consider it as settled, that to gifts of this kind, as incorporated into the common law, delivery is necessary. The whole law on this subject, is fully laid down by lord *Hardwicke* in *Ward* v. *Turner*, 2 *Ves.* 431. It was formerly doubted, but is now established, (as conceded by the plaintiff's counsel) that a bond is a proper subject of this kind of gift. It is a wise principle of our law, that delivery is essential, because delivery strengthens the evidence of the gift. Too much care cannot be taken, in insisting on the most convincing evidence in cases of this kind; for these donations do in effect amount to a revocation *pro tanto*, of written wills; and not being subject to the forms prescribed for nuncupative wills, they are certainly of a dangerous nature. Now let us consider the delivery which was made in this case. In the first place it was not to the donee, but to the donor's wife to be by her delivered over. There is no objection to this mode of delivery. Whether made to the donee immediately, or to another for his use, is immaterial. It was so decided in *Drury* v. *Smith*, 1 *P. Wms.* 404.

The circumstance relied on by the plaintiff's counsel, is, that the delivery to the wife was in fact no change of possession, because the possession of the wife is the possession of the husband, and the wife being in the husband's power, he may at any time take back the possession, and thus avoid the gift. To give this observation its full force, it is contended on the part of the plaintiff, that a gift of this kind passes the property *immediately*, and is not subject to revocation by the donor. Without absolutely committing myself, I incline to the opinion, that in this as in several other particulars, it partakes of the nature of a legacy, and is revocable. No case has been cited exactly in point; but it is laid down in *Ayliff's Pand.* 331., that it may be revoked by the donor's *repenting thereof;* and in *Prec. in Chan.* 300., the Lord Chancellor, in delivering his opinion, said to the counsel, "you agree "that a *donatio causa mortis* is revocable by the testator." It is true that in the arguments of the counsel, as reported, no such concession appears. One would hardly suppose however, that the chancellor would have used those expressions unless the fact had been so. But the case of *Miller* v. *Miller*, 3 *P. Wms.* 356., is strong to the point of delivery. Indeed the argument from that case is *a fortiori*; for there the donation was to the wife, and the delivery to the wife, and held good. There is no weight in the remark, that in that case the testator delivered the chattel in the first instance to a servant, to be by him delivered to the wife; for she was *present*, and the delivery over to *her* was made in a short time and in the testator's presence. There can be no reason why a delivery to the wife for her *own* use should be good, and yet not good if for the use of another. Upon the whole then this donation was perfect; it was made in the testator's last illness, and accompanied with the delivery of the bonds, which is all that the nature of the case admits of. I am therefore of opinion that the plaintiff's rule should be discharged.

YEATES J. There seems to me no ground whatever for asserting that the present verdict was contrary to evidence. It rested solely on the credibility of *Theodosia Craig*, the widow of the intestate, of which the jurors were the sole

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judges. They were instructed to deliberate calmly upon her testimony, and on the one hand to consider the danger of such evidence, the necessary consequences of parol evidence in such cases in general, and the particular prepossessions of the witness in this case towards her niece; on the other hand, they were told to recollect, that she testified against her own interest as to one half of the demand, that the impulse of her husband's mind was favourably directed towards Mrs. *Tucker* his adopted child from early infancy, which was confirmed by the unfinished wills wherein he marks her husband and children as objects of his bounty, that the probability of her story, her character and manner of giving testimony, should also be taken into view, and a temperate decision formed on the whole. The jury have affirmed the credibility of the witness by their verdict, with which I am perfectly satisfied. As to the conduct of *Tucker* in cancelling the bonds, and prevailing on *Stephen Sicard* to acknowledge satisfaction on the record of the mortgage, after he had assigned it over to the intestate, the jury were told that it was highly improper and reprehensible; but if the children independently of these acts were intitled to the benefit of these bonds, such acts would not defeat their interest therein.

I think the evidence would have warranted the jury to pronounce the gift to the defendant's children to be absolute in the first instance, and to take effect immediately, and therefore irrevocable in its nature. Nothing was said or hinted at, of its being a conditional gift in case of his death; but *he gave the bonds to* Tucker's *children equally to be divided between them;* and such might be a good present *donatio inter vivos.*

Supposing however that the act was done in contemplation of death, and that it could only take effect as a *donatio causa mortis*, I think it may be established as such. It is agreed on all hands, that in such cases the gift must be made in the party's last sickness, and be accompanied by a delivery of the article to the donee, or some one in his behalf. The objection made in this instance is, that the delivery to the intestate's wife was insufficient, because it still remained while in her possession subject to his control, and therefore revo-

cable. The answer is, that a small matter will operate as a good delivery; such as a mixed possession, the delivery of the key of the room in which the furniture given is, to the donee. *Smith* v. *Smith*, 2 *Stra.* 955. Besides, it is fully established, that a wife is capable of taking a *donatio causa mortis* from her husband, being in nature of a legacy, though it need not be proved as a will. *Miller* v. *Miller et al.* 3 *Wms.* 356., *S. C.* 2 *Eq. Ab.* 356. *pl.* 24., *Lawson* v. *Lawson*, 2 *Eq. Ab.* 575., 3 *Woodes.* 514. Now what good reason can be assigned, that the possession of the article by the wife is sufficient to validate a gift made by her husband in his last illness for her exclusive benefit, and yet that a like possession as agent for another shall not be good? It is equally subject to countermand and revocation in both instances. She may be attorney to deliver seisin to her husband. *Co. Litt.* 52 *a.* Moreover we have the authority of the lord chancellor for asserting that a *donatio causa mortis* taking place *in futuro*, is revocable as a will during the life of the party. *Jones* v. *Selby*, *Prec. Cha.* 303. And the reason why it should not prevail against creditors, is that it is considered as a legacy. *Drury* v. *Smith*, 1 *P. Wms.* 406., 2 *Bla. Com.* 514. According to the language of the chancellor in the last case, a man certainly, notwithstanding his will, has a power to give away any part of his estate in his lifetime. He might in his lifetime, after the making of his will, give away any part of his estate *absolutely;* and by the same reason he might do it *conditionally*. The conditional gift presupposes the power of revocation; were it not so, a gift *bona fide* in the lifetime of the party, would prevail against creditors after his death.

Many of the observations of the plaintiff's counsel seem to me rather referable to the general state of the law, as now settled, than as objections to what was done either by the court or jury in the cause before them. I feel the force of the remarks made, that a written will is attended with more security and certainty, than a verbal gift of goods and property in the nature of a *donatio causa mortis;* and that frauds and perjuries may arise from parol testimony in the latter case, no reasonable mind can doubt. To the court belongs the duty of deciding upon the competency of evidence; but the jury ultimately must decide upon the credibility of the wit-

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nesses. As to a widow's oath in cases of this nature, her interests will in general prevent her from acting collusively to the prejudice of children, or collateral kinsmen. Should it unhappily prove otherwise, I know of no other safeguard than the intelligence of independent jurors. If the circumstances will fairly warrant the conclusion, that a nefarious scheme has been meditated to plunder the next of kin, I trust it would soon be rendered abortive.

On the whole, I am of opinion, that judgment on the verdict should be rendered for the defendants.

BRACKENRIDGE J. was of the same opinion.

Judgment for defendants.

3b 374
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25 345

Philadelphia, Saturday, March 30.

Lessee of HALL *against* JACOB VANDEGRIFT and others.

A devise to *A*, "and his lawful begotten "*heir* forever" is an estate tail in *A*.

It is sufficiently clear that in a will, if not in a deed, *heir* is *nomen collectivum*, and the same as heirs.

It is not necessary that the body from which the issue is to come, should be mentioned in express terms, in order to make a good estate tail. It is sufficient if the intention of the testator appears with reasonable certainty.

THIS was an ejectment, in which the following case was stated for the court's opinion;

Sarah Mallowes, being seised in fee of the premises in the declaration, on the 16th *December* 1723 duly made and published her last will and testament in writing, bearing date the day and year aforesaid, and therein devised as follows: "*Im*-"*primis* I give and bequeath to my kinsman *Solomon Hall* "ten pounds in lawful money, likewise sixty acres of wood-"land joining on the northeast side the plantation he now "dwells on, *I give to him and his lawful begotten* HAIRE *for*-"*ever*."—"*Item* I give unto my negro boy *Toby*, when he

It is the spirit of the act of limitations to allow twenty-one years from the time that a person might make an entry and support an action, the statute not stopping after it has begun to run, in consequence of infancy coverture or any other disability. But if a party has not a right of entry, but only a possibility which may give a right of entry at a future day, the statute does not run against him, until that right accrues. Hence, notwithstanding the next heir in tail releases to the tenant in tail in possession, the statute does not run against the releasor until the death of the tenant in tail without issue.

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" arrives at the age of twenty-four years of age, the sum of " ten pounds lawful money, likewise ten acres of land lying " at the north corner of my land, to have *during his life*."— " *Item* I give and bequeath to my kinsman *Joseph Hall*, " and to *his lawful heirs forever*, all my plantation that I " have not before given, with all its improvements thereon, " I give and bequeath to my kinsman *Joseph Hall* and his " lawful heirs forever. And for the love and affection I do " bear unto my kinsman *Joseph Hall*, I do give and bequeath " unto the aforesaid *Joseph Hall*, all the *reversion* of what " I have herein before given of my estate both real and per- " sonal, or of what kind or nature soever they be, I give un- " to my said kinsman *Joseph Hall and his heirs forever*."

The testatrix died seised as aforesaid without altering or revoking her said will, *Solomon Hall*, the devisee therein mentioned, surviving her.

Solomon Hall the devisee, after the death of *Sarah Mallowes*, entered into the premises, and died seised thereof, leaving lawful issue four children, to wit, *John Hall* his eldest son, *Solomon Hall* his second son, and two daughters, *Sarah*, who intermarried with *David Davis*, and *Mary Hall*.

After the death of *Solomon Hall*, the said *John* entered upon the premises, and about the latter end of 1785, or beginning of 1786, died without issue, his brother *Solomon* above mentioned, who was his heir at law, surviving him.

On the 18th of *May* 1786, the said *Solomon Hall* last mentioned died, leaving lawful issue, *Jacob Hall* his eldest son and heir at law, the lessor of the plaintiff, and five other children.

The defendants are in possession; and they and those under whom they claim, have been in possession of the premises in the said will of *Sarah Mallowes* mentioned, and devised as aforesaid, ever since her death, and claim the same by force and virtue of the following deeds, will, and conveyances.

On the 30th *August* 1750, *William West* and *Elizabeth* his wife, (who who was the widow of *Solomon Hall* the devisee of *Sarah Mallowes*) *Solomon Hall* one of the sons of *Solomon* the devisee, *David Davis* and *Sarah* his wife one of the daughters of the said *Solomon* the devisee, and *Mary Hall*

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another daughter of the said *Solomon* the devisee, released all their right and title to the property devised by *Sarah Mallowes* as above stated, unto *John Hall* eldest son and heir at law of *Solomon Hall* the devisee of *Sarah Mallowes*, in fee, with a warranty against all claiming under them. [The deed was in these words, " have granted, remised, released, and " confirmed, and do grant, remise, release and confirm to " the said *John Hall*, his heirs and assigns &c."]

On the 26th *April* 1754 *John Hall* and wife conveyed the above premises to *Benjamin Britton* in fee. [And the case then proceeded to deduce the title down to the defendants.]

The question for the opinion of the court, was whether the plaintiff was intitled to recover.

It was argued first in *December* term last by *Condy* for the plaintiff, and by *Rush* and *Hopkinson* for the defendants.

For the plaintiff. The plaintiff claims as heir in tail of *Solomon Hall*, under the will of *Sarah Mallowes*. If *Solomon* took an estate tail under that will, we are intitled to recover, otherwise not. The word *heir*, in the singular number, is the only thing which can create a doubt; but we think it perfectly well settled, that *heir* is *nomen collectivum*, and both in wills and deeds equivalent to *heirs;* certainly it is so in a will. The opinion of lord *Coke* is known to be the other way. He says that if land be given to a man and his *heir*, in the singular number, he hath but an estate for life. The reason which he gives for it, is however a bad one; " his heir cannot take " a fee simple by descent, because he is but one, and there- " fore in that case his heir shall take nothing." This reason evidently begs the question; for his heir we say is not one, but all who at different times stand in that relation. Accordingly his learned commentator puts against that opinion many authorities, that as well in a deed as a will, *heir* may operate in the same manner as *heirs*, in the plural. *Co. Litt.* 8. *b. note* 4. Lord *Coke* himself, in a subsequent page, agrees that " heir in the singular number *in a special case* may create " an estate tail, as appeareth by 39 *Ass. p.* 20," where lands were given *to a man and to his wife, and to one heir* of their bodies lawfully begotten, and *to one heir* of the body of that

heir only. This was held to be an estate tail, although to use lord *Coke's* language, it was much more *coarcted* or restrained than the present. *Co. Litt.* 22 *a.* In *Richardson* v. *Yardley* (*a*) *Popham* says, if land be devised to one for life, and after to his *heir* male, it is tail. The point was expressly decided in *Clerk* v. *Day.* (*b*) All the justices, says the reporter, agreed that a devise to one and the *heir* of his body, is an estate tail; "for heir is *nomen collectivum*, and one can "have but one heir at one time, and this shall go from heir "to heir." To the same point is *Whiting* v. *Wilkins*, (*c*) which was a devise to *Robert Whiting* the testator's son *in perpetuum*, and after his decease the remainder to his *heir* male *in perpetuum;* and it was held by the whole court to be a good estate tail in *Robert.* So 1 *Roll. Abr.* 832. *Estate K. pl.* 1., a gift to one and his *heir* was held to be a fee in the donee; and in *Dubber* v. *Trollop* (*d*) Lord *Coke's* opinion is denied to be law by Chief Justice *Eyre* in delivering the opinon of the court.

If it be objected that the body from which the heir must proceed, is not particularly indicated in this case, it is answered that it appears with sufficient certainty. To *Solomon Hall* and his lawful begotten heir, is the same as to him and his heir by him lawfully begotten. It is not necessary to use the words *de corpore.* In *Church* v. *Wyatt* (*e*) the devise was to *A, et hæredibus suis legitime procreatis*, which is precisely the present devise. And in *Barret* v. *Beckford* (*f*) which was a devise to *A* and his legitimate heirs, lord chancellor *Hardwicke* says in terms, the proper construction of *legitimate heirs* is heirs of his body lawfully begotten; for if to him and his heirs lawfully begotten, *that would be heirs of his body.* The difference between a lawful and an illegitimate heir occurs only when the particular parent is referred to. In such a case lawfully begotten heir, means issue.

The testatrix intended to keep this estate in the line of *Solomon Hall.* Though illiterate, she knew the difference between estates. To *Toby* she gives an estate for life, and to *Joseph Hall* a fee simple, in legal terms. When she spoke

(*a*) *Moore* 397. *case* 519. (*c*) 1 *Bulstr.* 219. (*e*) *Moore* 637. *case* 877.
(*b*) *Cro. Eliz.* 313. (*d*) 8 *Vin.* 233. *pl.* 13. (*f*) 1 *Ves.* 521.

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of lawfully begotten heirs, she must therefore have intended the lawful issue of *Solomon*. *Joseph* was the peculiar object of her bounty, not *Solomon*. She gave a fee simple to him in a part of her farm, and the *reversion* of what she had before given of her estate, which was the life estate to *Toby*, and the estate tail to *Solomon*. This is very strong to shew that she did not intend the entire fee should go to *Solomon*.

For the defendants. This case is not intitled to favour. The spirit of our code is opposed to this restricted inheritance, and has brought the distinction between a fee simple and a fee tail to a mere name, by authorizing the tenant in tail to bar the issue by a deed of bargain and sale. The estate in question has moreover been considered a fee simple since 1723. It has been sold as such to *bona fide* purchasers for a valuable consideration; and the plaintiff claims not only against them, but against the deed of his father. The words in this will, do not in their proper and legal acceptance create a tail; and words must be taken in this way in a will as well as in a deed, unless there is a plain intent to the contrary. If therefore there is nothing like such a plain intent in this will, the consequence must follow, that there is no tail. Whether *Solomon Hall* took for life or in fee is of no consequence; either way the plaintiff cannot recover.

Blackstone defines an estate tail in general to be, where lands and tenements are given to one and the heirs of *his* body begotten. Two things therefore are necessary; words of inheritance, and words limiting that inheritance to the heirs of a particular body. 2 *Bl. Comm.* 113. No case has been shewn, where these have been dispensed with in a deed; and it is not conceded that any such case can be shewn. On the contrary there is no doubt, that for want of certainty as to the body, these words in a deed would not amount to an estate tail, but to a fee simple or an estate for life. *Abraham* v. *Twigg* (*a*) is in point that they would not. The deed there was to *A* and his heirs males lawfully engendered; and held that it was not tail. But greater indulgence is shewn to wills, if the intention of the testator plainly requires it. Still it must be a certain and manifest intention, or the legal import of

(*a*) *Cro. Eliz.* 478.

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the words must prevail. *Wild's case.* (*a*) To a man and his seed, or the like, is a good tail in a will. But there the body is designated. Here it is to *Solomon Hall*, and his lawful begotten heir. What is the difference between this and his lawful heir? Does it necessarily mean, begotten by him? Not at all. Any legitimate heir, or in fact any heir, of *Solomon Hall*, is his lawfully begotten heir. There is therefore no evidence of plain intention, because the words will answer for a fee at least as well as for an estate tail. Indeed the intention must be presumed to have been in favour of a fee. Ignorant people uniformly mean to give the whole, where they do not expressly and plainly limit the gift, as the testatrix did in the present will, where she gave *Toby* an estate for life. She probably never heard of an estate tail, and did not know what it was. She takes no particular care of the issue of *Solomon*, but leaves the whole subject to his disposition, at least by some species of conveyance; and what emphatically shews her intention to part with the whole estate, is her closing the devise by the words *for ever*. To suppose that the testatrix knew that these terms would limit the inheritance to any other description of *Solomon's* heirs, than those born in wedlock in some branch or other of his family, and that the estate would upon a certain event cease, is to attribute to her an intimacy with law, which is impossible, and which the will disproves throughout. *Reversion* is of no importance here. The life estate of *Toby*, was enough for that to operate upon.

No case cited for the plaintiff comes up to this. Mr. *Hargrave* in his note 2. to *Co. Litt.* 20 *b.* cites *Moore*, *case* 711., for the decision, that a devise to one *et hæredibus legitime procreatis* is tail; but the case of that number is in *prohibition*, and has nothing to do with the subject. In *Church* v. *Wyatt*, there were other parts of the will of much more weight than the particular words in question; the estate being devised over, only in case the first devisee should die without *fruit of her body*. And in *Barret* v. *Beckford*, what lord *Hardwicke* says, must be applied only to the case before him, where there was also a limitation over, if the first devisee

(*a*) 6 *Rep.* 16 *b.*

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died without legitimate heirs. These expressions unequivocally confined the issue to the body of the devisee, and therefore there was a plain intention in the testator that the inheritance should be restricted. Nothing of that kind exists here. The testatrix was anxious that the heirs should be lawful, but she did not care who got them.

Cur. adv. vult.

The case was again argued at the present term, by *Condy* for the plaintiff, and by *Tilghman* for the defendants, upon the question, whether the defendants were not protected by the statute of limitations.

For the defendants it was said that the statute was founded in public convenience, and that its principle was so reasonable, that courts of equity had applied it to cases, to which in strictness it did not extend. *Johnson* v. *Smith* (*a*), *Green* v. *Rivett* (*b*), *Eldridge* v. *Knott* (*c*), *Sir Thomas Standish* v. *Radley* (*d*). When it once begins to run, no disability of infancy, coverture, or the like, will prevent its running on, until the limitation is out. *St. John* v. *Turner* (*e*), *Nevarre* v. *Rutton* (*f*). Hence if the statute began against *Solomon Hall* the younger, it will run against his issue, and the court will favour the application of it to protect such defendants as these.

Solomon Hall released to *John* his brother on the 30th of *August* 1750. This release inured solely by way of extinguishment, as the releasee could not have the thing released. *Litt. sec.* 479, 480. It follows therefore that from the moment of the release there was a possession adverse to the estate tail of *Solomon*, which continued to the bringing of this action in 1804, and is a bar. If the release had passed any estate, I grant that during its continuance, the statute would not have run against the grantor, because the possession would have been according to the grant. But it is not so, where nothing passed, but the grant merely extinguished the right of the releasor.

For the plaintiff. There are two reasons against the appli-

(*a*) 2 *Bur.* 961. (*c*) *Cowp.* 215. (*e*) 1 *Eq. Abr.* 314. *pl.* 4.
(*b*) 2 *Salk.* 421. (*d*) 2 *Atk.* 171. (*f*) 2 *Eq. Abr.* 9. *pl.* 6.

cation of the statute, first because it runs, in express terms, only from the time when the right or title to the same first descended or accrued. 2 *St. Laws* 28., *Act of* 26*th March* 1785. Now *Solomon Hall* the younger could have no right or title to this estate until the death of *John Hall* without issue in 1785 or 1786, and twenty-one years did not elapse between that time and the commencement of the action. During *John's* life, *Solomon* had only a possibility to take the estate upon a future event, and therefore it was impossible for the plaintiff during *John's* life to do any thing to obtain possession. Neither he nor his father was intitled to it. The statute was not intended to bar those who could not bring a suit. Besides, *John* and those claiming under him were in possession lawfully during *John's* life, and they could not elect to be in by wrong and adversely to us, under the deed of *Solomon*. A *second* reason is, that if the argument were allowed, it would introduce a new mode of barring intails, never before heard of. The tenant in tail can bar his issue only by fine or recovery, or by lineal warranty with assets.

TILGHMAN C. J. The first question in this case, is, what estate passed to *Solomon Hall*, by the following devise in the will of *Sarah Mallowes*. "I give and bequeath to my kins-"man *Solomon Hall*, 10*l.* in lawful money, likewise 60 acres "of woodland, joining on the northeast side the plantation "he now dwells on, *I give to him, and his lawful begotten* "*heir for ever.*" The first reading of these words made a strong impression on my mind, that the land was intended to go to the lawful issue of *Solomon Hall;* and that impression has been strengthened by the argument which we have heard, and by subsequent reflection. I cannot think, that an unlettered person as the testatrix evidently was, would make a distinction between the expression "his lawful begotten "heir," and "the heirs lawfully begotten by him." If the devise had been to him and to the heirs lawfully begotten by him, it would have been a clear estate tail.

I will consider the objections against an estate tail, and the authorities which have been cited. It is objected, that the words *for ever* indicate an intent to give *a fee*. But these words are properly applied to an estate tail, because an estate tail may continue for ever, and was, at common

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law, a fee simple of a particular nature. It is next objected, that there can be no estate tail, because the devise is to the lawfully begotten *heir*, not *heirs*. Lord *Coke* in 1 *Inst.* 8 *b.*, does say, that a gift to *A* and his *heir*, is only an estate for life; his opinion is upon a gift by deed, and therefore not strictly applicable to a devise. But even on a deed, the opinion of *Coke* is positively denied by *Eyre* C. J. in delivering the opinion of the court in *Dubber* v. *Trollop*, 8 *Vin.* 233. *pl.* 13. His expressions are, that "the opinion "of *Coke* is not warranted by any thing in *Littleton*, and is "directly contrary to 39 *Ass. s.* 20., where lands were "given to a man and his wife and *one heir* of their bodies, "which was held to be an estate tail." In *Whiting* v. *Wilkins*, 1 *Buls.* 219., a devise to *A* for ever, and after his decease to his *heir male* for ever, was adjudged an estate tail. It is there said, that *heir male* and *heirs male* is all one, because *heir* is *nomen collectivum*. The plaintiff's counsel cited other cases to the same purpose, which it is unnecessary to notice, as the point is sufficiently clear. The last and principal objection is, that it is not expressed from whose body the heirs shall issue, but only that they shall be the heirs of *Solomon Hall*, and that they shall be lawfully begotten. The rule of law certainly is, as laid down in 2 *Black. Comm.* 113., that to create an estate tail, it must appear from whose body the issue is to be. The question still recurs, does it not appear by this devise? It is sufficient, if the intention of the testator appears with reasonable certainty. But it is not necessary that the body from which the issue is to come, should be mentioned in express terms. Why was the word *begotten* introduced into this devise, if not intended to designate heirs begotten by the devisee? It is too far fetched an idea, to suppose, that the testatrix looked to the *general* heir, and used the words *lawfully begotten* only to prevent any person *unlawfully* begotten, from inheriting. The defendant's counsel think it unnatural that an ignorant woman should take it into her head to create an estate tail. I agree with them, that she might not think of an *estate tail*, because probably she did not know what it was. But it was very natural that she should wish to limit the estate to the issue of the devisee. The desire of confining property to a particular family, seems

deep rooted in the human breast. From whence this passion springs, which delights in exercising a kind of dominion over property after death, it is unnecessary to inquire. But the fact is, that we see it prevail in people of *all conditions*.

I have hitherto considered the intention of the testatrix, as appearing only from the words which I have mentioned. But there are other parts of the will which strengthen the idea of an estate tail. In the concluding paragraph the testatrix devises land to her kinsman *Joseph Hall* and to his *lawful heirs for ever*. Also for the love and affection she bears him, she gives to him and *his heirs for ever*, all the *reversion* of what she had before given of her estate both real and personal. Here it appears, that *Joseph* was her favourite, and that she knew how to give an absolute fee simple, where she intended it. The devise of the *reversion* may it is true be satisfied, by referring it to a piece of land which had been given in the former part of the will, to the negro boy *Toby* expressly for *life*. But it may also be referred to the land devised to *Solomon Hall*, and at all events it leaves no ground for the argument which might otherwise have been raised, that a fee simple was intended to *Solomon*, because there was no devise of the reversion.

These are the arguments which would have satisfied me, that *Solomon* took an estate tail, if no authorities could be produced on the subject. But we are not without respectable authority. Mr. *Hargrave* in his edition of *Co. Litt. note* 121., says, a devise "to one and his heirs lawfully "begotten," is an estate tail; and he cites 43 *Eliz. rot.* 1408., *Moore*, *case* 711. It is very true that nothing is to be found in *Moore* to support this opinion. There is certainly a mistake in the reference to *Moore*. Whether the original roll justifies Mr. *Hargrave's* citation, we are left to conjecture. In general he bears the character of a man of accuracy. But what has much greater weight with me is the opinion of lord *Hardwicke* in *Barret* v. *Beckford*, 1 *Ves.* 521., that a devise to one and *his heirs lawfully begotten*, means *heirs of his body*. The case decided by lord *Hardwicke* did not turn on those words, but the opinion I have mentioned was given in the course of his argument. It is not of equal authority with an adjudged case, but considering the man from whom it

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came, it carries weight with it. Upon the whole I am well satisfied that *Solomon Hall* took an estate tail.

The second question is on the act of limitations, and will depend on the effect of the deed of the 30th *August* 1750, from *Solomon Hall* deceased (father of the lessor of the plaintiff) to *John Hall* son and heir of *Solomon* the devisee. At the time of making this deed, *John Hall* was seised of the premises as tenant in tail, and *Solomon* (the grantor or lessor) was not seised of any estate, but had a possibility of becoming tenant in tail, in case of *John's* death without issue. The deed contains words of *grant*, as well as of *release*, and there was a small consideration of money. It is contended for the defendant, that this deed operated by way of *extinguishment* only, and that the act of limitations began to run from its date. If the grantor had any right capable of being transferred, the deed would operate as a *legal transfer* during his life. It would pass an estate in fee simple, defeasible by the entry of his issue. It did not take away the right of entry of his issue, because it could not work a discontinuance of the estate tail. I cannot conceive that the act of limitations could take any effect, before the death of *John Hall* the grantee, because during his life he was rightfully seised of an estate tail. Immediately on his death, a right to the estate tail descended upon *Solomon* (the father of the lessor of the plaintiff), or would have descended on him, if he had not made the deed before mentioned. From that time there was a possession *adverse to the estate tail*, and from that time the act of limitations would run. This act made in the year 1785, enacts, that no person shall make an entry into any lands &c., after the expiration of twenty-one years next after his title *first descended or accrued*, nor shall any person maintain any action for any lands &c., of the seisin or possession of himself or his ancestors, or declare or allege any other seisin or possession of himself or his ancestors, than within twenty-one years next before the commencement of his suit. Now the right of the lessor of the plaintiff's father *Solomon Hall*, first descended or accrued on the death of *John Hall* his brother within twenty-one years before the commencement of the suit. At the time of his making the deed, he had neither right or title *accrued*, but only a possibility that it might

thereafter accrue. It is the spirit of the act of limitations to allow twenty-one years from the time that a person might make an entry, or support an action; understanding always that when the twenty-one years once begin to run, they shall not be suspended by infancy, coverture, or any other circumstance. Upon this principle, the lessor of the plaintiff is not barred of his action. I am therefore of opinion, that he is intitled to a judgment.

YEATES J. It is admitted on all hands, that the words "*heirs of the body*" are the proper technical terms, to create an estate tail in all grants and gifts by deed; but it is also certain, that the precise expressions *de corpore* are not indispensably necessary in such cases to create an estate tail, so long as there are other words equivalent; as in a grant to "a man "and his wife, and the heirs by them procreated," or "to a "man and his heirs which he should beget on the body of "his wife," &c. *Co. Litt.* 20 *b.*, 7 *Co.* 41 *b.*

In wills the fundamental principle is, that the intention of the testator shall govern the construction; provided the estate devised be not inconsistent with the rules of law. It is a melancholy truth, that men too frequently postpone putting their houses in order, and making their final arrangements until the last moments of their existence. Hence the legal presumption arises, that in the performance of this solemn act, they are ignorant of the law and without learned counsel; for which reason, the law will execute their intention, if it can be plainly collected from the expressions they have made use of.

By recurring to the instrument before us, we find, that *Sarah Mallowes* the testatrix, bequeathed "to her kinsman "*Solomon Hall* 10*l.*; likewise 60 acres of woodland adjoining "on the northeast side the plantation he then dwelled on, "she gave *to him and his lawful begotten haire for ever.*" To her negro boy *Toby*, she gave 10 acres of land lying on the northeast corner of her land, to have *during his life:* "and "to her kinsman *Joseph Hall* and *to his lawful heirs for ever*, "she gave all her plantation, that she had not before given, "with all the improvements thereon to him *and his heirs for* "*ever;* and for the love and affection she had unto him, she

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"gave and bequeathed to the aforesaid *Joseph Hall*, all the "reversion of what she had therein before given of her es- "tate both real and personal, or of what kind or nature "soever unto her said kinsman *Joseph Hall and his heirs for* "*ever*."

It appears then, that *Joseph Hall* was the favourite object of her regard and affection; and that whoever penned the will, knew well how to describe an estate for life, as well as an estate in fee simple. It would naturally occur to any one who reads this will, to inquire why in the devise to *Joseph Hall* the words used are *to him and his heirs for ever*, and in the devise to *Solomon to him and his lawfully begotten heir for ever*, if the testatrix meant to grant to each devisee a fee simple? The difference of phraseology would seem to import a difference of intention; and this construction is fortified in my idea, by the expressions "*his* lawfully begotten "*heir*." The pronoun *his* coupled with the other words, has the same signification as *by him* lawfully begotten, negativing the idea of *collateral* heirs; and *heir* in the singular number, would seem to point to the individual heir at common law, claiming *per formam doni*, in contradistinction to the rules of descent established by our acts of assembly. At the same time, I freely admit, that *heir* may be *nomen collectivum* as well in deeds as wills, and operate in both in the same manner as *heirs* in the plural number, according to the authorities cited in *Hargrave's note* 4 to *Co. Litt.* 8 *b.* The expressions *for ever* are often inserted in the formation of estates tail. The issue in tail may by possibility exist the same period of time as general heirs.

The case of *Abraham* v. *Twigg* was cited by the defendant's counsel from *Cro. El.* 478. It is said in the conclusion thereof, that in a devise, the words *of the body* must be expressed to make an estate tail. But this is contradicted by the whole current of authorities; and in a more full report of the same case in *Moore* 424., the instances of feoffments and wills are expressly distinguished from each other in this particular. The rule at law is, that in every estate tail, within the statute of *Westm.* 2., it must be limited either by express words, or words equipollent, of what body the heir inheritable shall issue. *Co. Litt.* 27 *b.* And if it be not ex-

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pressed, it cannot be taken to be within the equity of the said statute; so that if the gift be to one and his heirs females or males, the donee has a fee simple. *Litt. s.* 31. The only question here therefore is, whether the testatrix has used sufficient words to limit the inheritance of the 60 acres of land in dispute to the issue of *Solomon Hall.* To the different abridgments for the several decisions on this subject, I refer. 10 *Vin.* 254, *T.* 5. *Tail.*—3 *Com. Dig. Devise N.* 5. 26. 1*st ed.*—2 *Bac. Estate Tail B* 259. 1*st ed.* The expressions of lord *Hardwicke* in *Barret* v. *Beckford*, 1 *Ves.* 521., are very strong. The proper construction of *legitimate heirs*, is heirs of his body lawfully begotten; for *if to him and his heirs lawfully begotten*, that would be heirs of his body.

But the case which most nearly resembles the present, is that of *Church* v. *Wyatt*, *Moore* 637. *case* 877., *Hil.* 37 *Eliz. C. B. Rot.* 1408., (which in *Hargr. note* 2. to *Co. Litt.* 20 *b.* is called 43 *Eliz.*, but in the same *court*, *term*, and *roll*). There one seised of a copyhold inheritance, surrendered it to the use of his will; and having a daughter born, and a child in *ventre sa mère*, devised part of the land to his son or daughter in *ventre sa mère*, wherewith his wife was then going, and *hæredibus suis legitime procreatis*, and the residue he devised to his daughter born, to have to her and the fruit of her body, and if she should die without fruit of her body, remainder to the child in *ventre sa mère*, and if both should die *without fruit* &c., then that *J. S.* should sell the lands; and he willed, that *one should be heir to the other.* And all the justices agreed that it was an estate tail in the daughter after born. It is true, that case was stronger than the one now before the court, by reason of the words *without fruit of their bodies*, and *that one should be heir to the other.* But we have the authority of lord chief baron *Comyns* in the third volume of his *Digest N.* 5. *Devise p.* 26, 1*st ed.*, that the words "*hæredibus suis legitime procreatis*," in a will, create an estate tail without other words; and Mr. *Hargrave* in his note before referred to, adopts the same opinion. The different operation of the same words in deeds and wills is strongly marked in *Idle* v. *Coke*, 2 *L. Ray.* 1144., 1 *Wms.* 70., *Salk.* 620., 11 *Mod.* 57., *Holt.* 164.; and conceiving here that the intent of the testator was plain and manifest, that

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the inheritance of the 60 acres in question was limited to the lawful issue of *Solomon Hall*, I am of opinion that he took an estate tail in the premises.

A second point has been made and argued during the present term. It has been objected that the plaintiff is barred from recovery of the premises by the act of limitations, the release of the 13th *August* 1750 operating by way of extinguishment; that no interest whatever passed thereby, and the statute then attaching, it ran on notwithstanding subsequent infancy, coverture &c. But the release of *Solomon* (the second) did pass his future contingent interest in case he should survive his elder brother *John*, and that the same *John* should die without issue. Were this even otherwise, the plaintiff would not be barred. Previous to the act of 26th *March* 1785, the statute of 32 *Hen.* 8. *c.* 9., and not the statute of 21 *Jac.* 1. *c.* 16., was held to be in force here. 1 *Dall.* 67. Now counting back from even *December* term 1804 (when this ejectment was commenced) to *August* 1754, only fifty-four years and four months would have elapsed, which is five years and eight months short of the period of time declared by the statute of 32 *Hen.* 8. *c.* 9. to operate as a bar.

If the devise to *Solomon Hall* was an estate in fee tail, his eldest son *John Hall* and those holding under him, were intitled to the legal possession of the premises during the natural life of the said *John Hall*, and therefore they could not be considered as holding by an adverse title to the lessor of the plaintiff. The act of assembly of the 26th *March* 1785, 2 *St. Laws* 281., was passed previous to the death of *John Hall*, as it is agreed that he died in the latter end of 1785 or beginning of 1786, and consequently the estate tail then descended on and accrued to him. Before this time he could make no legal entry, nor support an ejectment. The provisions therefore of the law of 1785 only can preclude him from recovering the lands in question. But his case is not embraced by the act, the second section enacting, "that from "*henceforth*, no person shall make entry into any manors, "lands &c., after the expiration of twenty-one years, next af- "ter his right or title to the same *first descended or accrued*." There is an interval of nineteen years between 1785 and

1804, and therefore the act interposes no bar in the present case.

Whatever my private feelings may be in favour of innocent purchasers, I feel myself bound to give my voice that judgment be entered for the plaintiff.

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BRACKENRIDGE J. To make this an estate tail there are wanting the words *of the body;* and it is only on the ground of an intention to intail, that the words used can be construed an intail; and this on the ground of indulgence in a devise. But I do not believe that an estate of this nature was intended; and this from considering,

1. The rank and country of the devisor. Had she been of the gentry or nobility of *England*, I could more readily have inferred the family pride of preserving an estate unbroken, and continued in the succession of a single heir. But the will in question was made in this state, and by an inhabitant of it.

2. The nature of the estate devised. It is not such a possession as one would suppose she could have had a wish to preserve undivided: a piece of woodland conterminal to the estate of the devisee; a strip of 60 acres, which if not given out and out, as we say in common parlance, would not so well suit the estate which he had adjoining.

3. I cannot easily suppose that if she had considered it an estate tail, there would not have been some understanding of it in the immediate devisee, and his family, and some tradition respecting it; whereas it appears not to have been thought of on the son of the devisee taking. Else why releases from the other children, if as heir in tail he could alone take? Or why not bar before alienation? It is evident that it did not come into his mind, or of those concerned at that day, that it was not a fee simple.

The reversion she bequeathes to *Joseph Hall*, is satisfied by referring to the life estate in the devise immediately preceding to the boy *Toby;* so that it will not be necessary to construe this an estate tail in order to constitute a reversion.

But from *the terms* of the devise, must not an intention be inferred of devising in tail? No. The language of the will is evidently that of a half learned person, with *motes of law*

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terms glimmering in his brain; but without seeming to know the use of each, in its particular place. *Lawful heir*, *begotten heir*, used now, and omitted again, carries with it evidence to me, of one who was aiming at the diction of the learned; or having an idea that certain terms of art were necessary in a will, without knowing where to place them.

But are not the terms such as are peculiarly applicable to an estate tail? The word heir in the singular number, (for I will read it *heir*, though it is spelt *haire*) and the word *begotten*. Agreed. But there is the word "*forever*," that is destructive of their special meaning, and goes to the fee simple. It is the natural adjunct of a fee simple, and inconsistent with an estate tail; which, in the nature of it, is not supposed to last *for ever*, but to be revertible to him from whom it came. An estate tail clearly given, yet *would be raised to an estate in fee simple* by the word *forever*, as implied in the observations of lord *Mansfield*, *Cowper* 412. The law contemplates as certain the determination of every estate tail. *Fearne* 171. And "a life estate to *M* (wife), remainder to *M* "(daughter) and the heirs of her body lawfully begotten, or "to be begotten, *as tenants in common*" gives a fee simple by purchase. So I say of the word *forever*. It is a word technically belonging to the fee simple; and being the more worthy, in the language of grammarians, must qualify and raise the special meaning of the others to its own dignity.

I must confidently demand that this at least be granted me, that the word *forever* qualifies, so far as to leave in balance the evidence of intention drawn from the mere force of the terms. The question then will be, to which construction shall I incline, where the evidence of intention is in balance. I speak of the evidence which is attempted to be drawn from the use of the terms. Which estate shall be favoured; that of the intail, or the fee simple? If we advert to juridical history, we shall find that the fettering of alienation by the fee conditional at the common law, was not a favourite of the judges, but that they winked at the evasion of it; or in the words of *Blackstone*, "gave way to a subtle finesse of construction, in "order to shorten the duration of these estates." And he goes on to observe that "when the nobility by procuring the statute "*de donis*, introduced the fee tail, the courts, by a kind of *pia*

"*fraus*, eluded the statute, by a fiction in barring the intail." And though the maxim of serving the intention in a devise, was extended in the construction of an estate tail, as well as with regard to any other subject of a devise, yet it is impossible not to see, in the juridical history of *British* decisions, what I may call an emancipation from the shackles of early precedent, in the case of intails; and I cannot but be of opinion, that were the same judges who at an early period made some of those decisions, on a bench at this day, they would be shackled still less; in this country, more especially, where a change of property under such decisions, could not affect; and where, in inferring an intention, they would look to the manners, customs, and habits of the people. 2 *Massachusetts Reports*, 62.

Nor is it only to these that we are to look, but to the *laws* of a community, and the policy of a construction according to the spirit of the statutes on the same subject. Under our colonial government, the policy of the intail became more questionable than it was in the mother country. The right of primogeniture did not exist in the same extent; nor was there the same reason for it, the support of a nobility. If we look to the early laws of distribution in the case of intestacy, we shall discover the inclination to subdivide estates amongst the individuals of a family, which is totally repugnant to the succession of a single heir. Is it not justifiable in narrowing or enlarging rules of construction, to look at the progress of alterations in the law itself by the legislature of a country? Is it not justifiable to look at even the change in the state of society which may vary the reason of a rule? We brought no church establishment with us from *England*, to enable us to provide for younger branches; nor was there an equal opportunity of advancement in the army or navy. The locking up estates was unfavourable to the "enlarging the em-"pire, and promoting useful commodities," which is recited in the charter as a consideration of granting it, and to which the subdivision of property was favourable. Shall we not take these things into view in the indulgence we shall give to the construction of terms not technically constituting an estate tail? In the application of a rule of construction, or even

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in the application of a principle under a different state of things, there is this latitude. *Talis enim est humani juris disciplina, ut opiniones, secundum varietatem temporum, senescant et intermoriantur, aliæque diversæ renascantur, et deinde pubescant.* A rule of construction is spoken of as flexible. See *Blackstone's* argument, *Perrin* v. *Blake.* Why not yield to a change in the genius and spirit of a system?

But taking it even according to the precedents to which we are referred of *British* decisions at the earliest period in the construction of terms, there has been none read that comes up to this. Nay, devises, as it would seem to me, more looking like an estate tail, have been adjudged a fee simple. I refer to the case of *Abraham* v. *Twigg*, "heir male lawfully "engendered," held not an estate tail, because there was not any *body* from whom this heir male should come. This case was that of a deed; but it is added in the report, *Cro. Eliz.* 478., that "so *it is in the case of a devise.*"

In the devise in question there is not only the want of the word *body*, which must be supplied to make an estate tail, but the word *ever*, which must be rejected to keep clear of the fee simple. I incline more to reject the word "begotten," and the insensible word "*haire;*" and the devise will then be "to him and his for ever," which in a devise is a fee simple.

The word *haire* is insensible, and I must reject one letter, and transpose another, to make it *heir.* Why this spelling to make out an estate of questionable policy, and of extreme hardship in an individual case? There can be nothing collected of improvidence in the ancestor, or that in transferring to the defendants, or those under whom they hold, there was not a full and valuable consideration which has substantially come to the use of the family, and of which the plaintiff himself may be presumed to have participated; and the amelioration of the property which may be presumed to have been made by the labour and the money of the defendants, must aggravate the hardship of a recovery against them; more especially as they are without warranty from the ancestor, and even if they were not, the value of the estate more than half a century ago, would go but little way to alleviate the misfortune. It cannot therefore be supposed that under these circumstances I can have any great inclination to col-

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lect and infer from technical terms merely, an intention which does not appear by declaration plain, or necessary and unavoidable inference. But the fact is that I could not possibly infer, were I disposed to indulge a construction, that she meant a *taking in succession by the eldest born*. The *tout ensemble* of the whole will together carries with it to me intrinsic evidence of the contrary. I take it to have been drawn by some *clerk's vade mecum* scrivener of the neighborhood, who had seen words in forms, and took them to be necessary in a last will and testament, without distinction of the use. This from my knowledge of the country, and what is usual in such cases. And I take it from the length of time that had elapsed before the idea of an estate tail in this case would seem to have been entertained, that the discovery of it at last was a matter of accident; and that it may well be called a windfall to the plaintiff succeeding in it. The terms of this devise therefore, on the strictest precedents, not imperiously demanding of me the construction contended for, I shall not give it; but hold the estate devised in this case a fee simple. It becomes therefore unnecessary for me to go into a consideration of the other point that has been made in the argument, the statute of limitations.

Judgment for plaintiff.

35 394
6 138
12 167
42 503
57 231
79 367
108 636

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Philadelphia, Saturday, March 30.

The UNITED STATES *against* VAUGHAN and others, garnishees of BIRD, SAVAGE, and BIRD.

Stock of the bank of the *United States*, which has been sold *bona fide*, and the certificate delivered to the purchaser with a power of attorney to transfer it on the books of the bank, is not liable to an attachment as the property of the vendor, although it is still standing in his name on the books of the bank, at the time of the attachment.

A chose in action, which has been equitably assigned, is not subject to attachment as the property of the assignor.

The plaintiff in a foreign attachment stands upon no better footing as to the thing attached, than his debtor, the defendant in the attachment.

IN *April* 1803, the *United States* attached in the hands of the president directors and company of the bank of the United States, twenty-four shares of stock as the property of *Bird*, *Savage*, and *Bird*, *which then stood in their name* on the books of the bank; and by agreement of the bank, the *scire facias* against the present defendants, who were garnishees in another attachment between the same parties, was to be considered as having issued against the bank, and the right to the stock was to be tried under the plea of *nulla bona*.

Of these twenty-four shares, *ten* were claimed by *Anne*, dowager dutchess of *Cumberland*, under a sale by *Bird*, *Savage*, and *Bird*, on the 10th *January* 1794: *Five* were claimed by *Benjamin Tucker*, under a sale by *John Capper* on the 29th of *October* 1802, to whom a sale was alleged to have been made by *Bird*, *Savage*, and *Bird*, on the 9th *July* 1797; *one* was claimed by *John Capper* under the same sale of 9th *July* 1797; and *eight* still remained, as was said, the property of *Bird*, *Savage*, and *Bird*. These claims were by agreement tried under one issue.

On the trial of the cause before *Yeates* justice at a *Nisi Prius* in *July* last, the district attorney, (*Dallas*) having proved that *Bird*, *Savage*, and *Bird* stopped payment in *London* on the 9th of *December* 1802, at which time they were debtors of the *United States* for more than 120,000 dollars,—that the attachment was laid upon the stock on the 9th of *April* following, when it still stood in their names,—that the first application by *Tucker* to transfer the stock, was in *December* 1803, by *Capper* in *August* 1804, and by the dutchess of *Cumberland*, at a still later period,—the counsel of the respective claimants offered to prove, that it had been the course of business in relation to sales of this stock in *England*, for the person who sold it, to deliver the certificate to the vendee, together with a power of attorney from him in whose name the stock stood to a third person, (usually the assistant

cashier of the bank) authorizing him to transfer the same to some person in blank; and that by the delivery of the certificate and the blank power of attorney, the share passed from hand to hand, the power of attorney never being filled up, until it was forwarded to the *United States* for transfer. They also offered to prove, that as to the *ten* shares of the dutchess of *Cumberland*, she bought them in this way in 1794, when the certificate and blank power of attorney had been delivered to her; that *Tucker* had bought his *five* shares from *Capper* in *October* 1802, when the certificate and a blank power were delivered, in which his name was inserted in *May* 1803; and that *Capper* bought *one* share in *July* 1797, a certificate and blank power for which were delivered on the 5th *September* following.

To this evidence the district attorney objected, upon the ground, that according to the construction of the act incorporating the bank, and of the by-laws of the bank made in pursuance thereof, there should be proof of an assignment or transfer of the stock in question *at* the bank of the *United States*, by *Bird*, *Savage*, and *Bird*, either in person or by attorney, to change the property, so as to prevent its being attached by the *United States* as the property of *Bird*, *Savage*, and *Bird*, in whose name the same stood at the time of the attachment; and that the course of business ought not to be given in evidence for the purpose of affecting in any way such construction.

His honour however admitted it, reserving the point; and the cause then went to the jury, principally upon the *bona fides* of the alleged sales, as to which there was much testimony that is not material. The jury found for the dutchess of *Cumberland* as to her *ten* shares, and for the *United States* as to the *six* claimed by *Capper* and *Tucker*, and the *eight* unclaimed; and now cross motions were made for a new trial, by the district attorney as to the dutchess of *Cumberland's* shares upon the reserved point, and by the counsel of *Capper* and *Tucker* upon the merits. The argument upon the reserved point is alone material.

Dallas for the *United States*. My principle is, that the rights of *bona fide* creditors should prevail against the equit-

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able rights of persons who had purchased shares, but obtained no legal transfer prior to the attachment. Property and the transfer of it are creatures of positive law. The practice of stock brokers in *Europe* is not to be regarded, if contrary to the act of congress. It is upon that the question must depend, without reference to the practice, however obstinate; and if by the law one kind of transfer only is permitted, it must follow that transfers not in conformity with the law are bad. I do not disturb the equitable rights of parties who transfer informally abroad. Among themselves it is done upon the footing of confidence; and the transfers are good perhaps, unless the rights of third persons intervene. But whether creditor or purchaser is immaterial, any person having an interfering right may say that the transfer is void, if it does not conform to the law. The act of incorporation is the exclusive rule for ascertaining the nature and modifications of the corporate property. If the charter has given a power to the corporation or to the stockholders individually, they have it; otherwise not. If it authorizes only a special and peculiar mode of assigning an interest in the corporation, it excludes all others, because none can exist but by special grant. The point therefore is this, whether the kind of transfer set up in this case is permitted by the terms of the act of incorporation, or by its general policy. I contend that it is not. No man can be a member of that corporation who is not either an original subscriber, successor or assignee. The third section of the law, 1 *U. S. Laws* 285., communicates the political character to none but the original subscribers, their successors and assigns. If a person having neither of these characters, claims an interest in the corporation, the law cannot notice it, this court cannot sanction it, the charter does not acknowledge it. These claimants are not original subscribers nor successors, but they interpose as assigns. How assigns? If so at all, they must be according to the charter. The twelfth fundamental article of the bank, *ib.* 291., directs that the stock of the corporation shall be assignable and transferable, according to such rules as shall be instituted in that behalf by the laws and ordinances of the same; and the by-law of the bank, which is set forth in the certificate of stock, makes it transferable *at*

the bank personally or by attorney. There is then but one mode of transfer permitted by the charter. All others are prohibited, or which is the same thing are not permitted, and therefore a person who does not derive his interest, in this way, is not an assignee. The claimants do not so derive their interest, and therefore they are not members of, and cannot assert any interest in, the corporation. Any other construction of the law would defeat its policy. The provisions relative to transfer are connected with the exclusion of alien influence. The bank was an object of jealousy. None but resident stockholders were permitted to vote by proxy. None but a citizen stockholder to be a director. If foreign ownership can be covered under the name of a citizen, here is at once an opening for the influence which it was intended to exclude. Under an *American* name aliens might vote, and in fact direct the bank. The law could not prevent the evil, but by permitting a transfer only on the books, which would at once disclose the real interest; and this court will disappoint all the caution of the law, if they recognise any title, except one arising out of such a transfer.

Condy, *Hallowell* and *Ingersoll* for the claimants. The only question is whether any transfer of this stock, is good to vest an interest, unless it is made on the books of the bank. The argument derived from policy, has no warrant in the law. The object of that law was to use foreign capital for domestic purposes, and to prevent any but residents in the *United States* from interfering with the use of it, by proxies. Foreigners if present might vote. Citizens if resident abroad, could not vote. The consideration was not whether citizen or alien, but whether present or absent, with which the mode of transfer had of course nothing to do. If this transfer was not permitted, still *Bird*, *Savage*, and *Bird* could not vote; if it was permitted, their assignees abroad would be in the same situation. In order to go to the root of the supposed mischief, the argument should have struck at all trusts in this stock, as well for citizens as aliens, and whether by transfer on the books as elsewhere; but for this there is no authority in the charter. The true construction of the clause relative to transfer, is that it was introduced for the

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convenience and protection of the bank, that they might know whom to recognise as stockholders, for paying dividends and the like. The government cared nothing about the mode, they left it to a by-law of the bank. Grant that any mode of transfer except that pointed out by the by-law, is void, still as between whom is it void? Certainly as between the bank and the nominal holder only. The 8th & 9th *W.* 3. *c.* 20, one of the statutes relative to the bank of *England*, makes void both in law and equity every transfer or contract for the transfer of stock, unless it is registered in the books of the bank within seven days, and actually transferred within fourteen days after the making of the contract &c. *sec.* 34. If the charter in question had done so, it would have been another case; its not doing so, is conclusive against the argument, since congress had the statute of *William* before their eyes, and copied parts of it. They wished to encourage foreign purchasers, which could only be by permitting sales without a transfer to vest a title, saving the bank from harm at the same time, by giving them a right to disregard any transfer not on their books. This is not so strong a case as *Levinz* v. *Will* (*a*), where the mortgage was not good by law to pass any estate, and yet it was held to pass an estate as against a creditor. Suppose a commission of bankruptcy, and an assignment; Mr. *Dallas's* argument is that the stock would not pass. Nay more, his argument is against the *United States*, because if it is good, they can get nothing even under a sale by the sheriff. This court however, will regard the equitable right. The assignment of a chose in action is absolutely prohibited at common law; and yet it is good in equity. The instant the money is paid to the vendor, he becomes a trustee, and equity would compel a specific execution. An equity is indeed conceded as between the original parties, but not as against a creditor. The concession must go the whole length. If a purchaser without notice were to interpose, he would no doubt take the stock; upon principles however which do not touch this case. But under the practice which was in evidence, and which was introduced merely to rebut a presumption of fraud arising from a delay to transfer, a second purchase from the same

(*a*) 1 *Dall.* 430.

person could not occur, as the certificate was always delivered to the first purchaser. As to a creditor, he stands in the same situation with respect to the thing attached, as his debtor. If the debtor has transferred the equitable interest in a chose in action, it is not attachable as his property. *Lewis* v. *Wallis* (*a*), *Corderoy* v. *Carpenter et al.* (*b*), *Stevenson* v. *Pemberton* (*c*), *Wakefield* v. *Martin* (*d*). Even an appropriation of a debt due to the defendant by the garnishee, cuts out a foreign attachment. *Sharpless* v. *Welsh et al.* (*e*).

Dallas in reply said, that the 34th section of 8 & 9 *W.* 3. had not been adopted, because the limitation of time would have been absurd. But the manner of transferring was intended to supply its place, the stock being at the risk of the purchaser, until a transfer on the books. As to the cases of a commission of bankruptcy, and a sheriff's sale, it was to be observed that both of these modes of deriving title affirmed the property of the nominal holder; and *res judicata* was moreover a title in the law, which was above all the restraints that were placed upon voluntary transfers. Before 8 & 9 *W.* 3., the shares of the bank of *England* stood as any other property, and the transfer of them was a matter in *pays*. It was the object of that statute, as it was of the act of congress, to make the transfer a matter of private record.

TILGHMAN C. J. gave no opinion upon the reserved point, having been of counsel with the dutchess of *Cumberland*, and given an opinion in her favour, while at the bar.

YEATES J. The reserved point in this case is, whether according to the true construction of the act of congress, intitled "an act to incorporate the subscribers to the bank of "the *United States*," passed on the 25th of *February* 1791, the depositions of the witnesses containing their answers to the interrogatories proposed under the commissions, ought to have been received in evidence upon the trial of this cause.

It cannot be denied, that a mere chose in action equitably

(*a*) 7 *Vin.* 226. *pl.* 18.
(*b*) 7 *Vin.* 225. *pl.* 15.
(*c*) 1 *Dall.* 3.
(*d*) 3 *Mass. Rep.* 553.
(*e*) 4 *Dall.* 279.

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assigned, is not subject to the operation of a foreign attachment instituted against the party, whose name must necessarily be used at law for the recovery of the demand; and that an attaching creditor can stand on no better footing than his debtor. This abundantly appears from the *English* authorities, and the adjudications in our sister states' courts, cited on the argument. A strong instance of this kind occurred in this court in *January* term 1793. *John Caldwell* brought a foreign attachment against *Vance*, *Caldwell* and *Vance*, and laid it on effects supposed to have been in the hands of *Andrew* and *James Caldwell*, who at one time were considerably indebted to them. Upon the plea of *nulla bona*, it appeared that a letter had been written authorizing *Hugh Moore* to receive this debt, and apply it towards payment of a debt due to *Moore* and *Johnston;* and the jury under the direction of the court, being satisfied that it amounted to an equitable appropriation of the demand, found that the garnishees had no effects in their hands due to *Vance*, *Caldwell* and *Vance*. This court sanctioned the verdict by their judgment. In like manner a bond made assignable in its first creation, which requires by our act of assembly the ceremony of a seal and two witnesses to authorize the assignee to maintain a suit in his own name, if transferred *bona fide*, without seal or witnesses, is not liable to be attached for the debt of the obligee resident in a foreign country. This appears perfectly plain.

Is there then any solid distinction between the instances I have put, and the case of shares of bank stock of the bank of the *United States?* If there is, it must rest on the provisions of the act of congress incorporating that bank. From the terms of the act itself we are enabled to extract its true spirit and policy. It contains no negative words similar to the *British* statute of 8 & 9 *William* 3. *c.* 20. *s.* 34, respecting the enlarging of the capital stock of the bank of *England*, that transfers not entered within a certain period in the books of the bank, shall be utterly null and void. It merely declares, that the stock shall be assignable according to the by-laws of the institution, but leaves the general principles of law and equity applicable to sales, as it found them. The by-laws of the corporation would necessarily provide for the

security of the stockholders, and the internal government of their concerns. Citizens only could be directors of the body corporate; residents only could vote in the affairs of the company; but aliens could be stockholders, and if residents, were intitled to vote without restriction.

The depositions were offered in evidence, to prove, that *Bird*, *Savage*, and *Bird* had, in the usual course of business in the *London* market, fairly sold certain shares of this bank stock to the several claimants, received the full considerations stipulated to be paid therefor, and had delivered over the original certificates with powers of attorney to transfer the shares to the claimants respectively. A considerable period of time must necessarily arise between the sales and formal transfers, where the contract is made beyond seas. Whether the claimants have been guilty of culpable negligence, in not procuring the powers to be executed in a reasonable time, forms another subject of inquiry, referable to the operation of the testimony, when all the circumstances of the particular cases are disclosed. In what relation then, previous to a formal transfer, did the original contracting parties stand towards each other? As between them, it is conceded, there subsisted a certain degree of equity, and why not a trust? *Bird*, *Savage*, and *Bird* ceased to have a beneficial interest in the shares of bank stock, which they had sold for a full price. It is true, on the face of the bank books they were the *nominal stockholders*, and a payment of the semi-annual dividends to them would have justified the directors of the bank. But had the power to transfer been revoked by the death of the attorney before its execution, or had it been consumed by fire, a court of equity would certainly have decreed a specific execution of the contract. I see no reason for distinguishing such a case from a sale of lands to be conveyed under a letter of attorney, where the attorney cannot exercise his functions, or the instrument has been destroyed by casualty. I therefore view *Bird*, *Savage*, and *Bird*, for the purposes of the present argument, as mere trustees for the claimants, against whom a chancellor would inforce a specific execution of their contract, if his conscience was satisfied from the evidence, that the transactions were fair and correct; and thinking as I do, that the *United*

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States can have no claim on bank stock, which their debtors had sold *bona fide*, previously to the laying of this attachment, I am of opinion, that the depositions were properly admitted as evidence to the jury on the trial.

BRACKENRIDGE J. Under this incorporation, only a *subscriber*, successor or assignee, can be a stockholder; and stockholders usually residing within the *United States* may vote; and a stockholder being a citizen of the *United States* shall be eligible as a director. For the purpose of ascertaining these rights, in the case of successor or assignee, some entry on the books of the corporation must be necessary. In the case of an original stockholder the subscription is evidence. I take this to be the extent of the regulation with regard to the notoriety of transfer. What should be evidence of an equitable transfer, or whether there could be an equitable transfer, is what I incline to think the corporation had no power to say. It could be the subject only of legislative exclusion; and if not excluded by the act of incorporation, the courts of law alone can be competent to determine. This on the general principle of the common law, as to what shall constitute an equitable interest in this as in any other species of property.

If an equitable interest is excluded, and the property only vests from the transfer on the books, so that the payment of the consideration and the delivering the certificate, are nothing without completing the evidence of purchase, it would so impede the transfer of stock, that we cannot suppose the corporation, admitting it to have the power, did contemplate such extent in this by-law. Nor unless we take it that the *United States* had it in view to discourage the stockholding by foreigners, to a greater extent than is expressed, can we suppose that they contemplated any mischief in the transfer at a distance. I must therefore be of opinion, that an interest could pass prior to the entry of a transfer on the books of the company. I go no farther at present, as it would be running into the second point of the case yet to be discussed, whether by delay in having the transfer entered on the books in a reasonable time, that equity is lost, which by the payment of the consideration, and the delivery of the

certificate, did at first exist. Had the certificate been retained by the original holders by the negligence of the dutchess of *Cumberland*, even though she had paid the consideration, and having that evidence still in their possession, they had transferred formally to a *bona fide* subsequent purchaser, it might form another case. She might be considered as in contemplation of law, a party to the fraud, and cut out. But an attaching creditor, even in the case of a certificate detained, the consideration being paid, is not in the situation of a purchaser. Although a debt may be due to him, it was not a credit given and a debt arising on this specific fund as in the case of a purchase. It is in the light of an execution, but not equally to be favoured (if a distinction could be drawn in carrying it into effect) with an execution. For that (the execution) supposes a judgment, which is of a higher nature than a mere debt of contract. But I take it that even a levy under an execution on stock in the hands of a trustee for another, could not take away the right of the *cestui que use*. It must be sold subject to his equity. If, therefore, the point is supportable of an equity independent of a transfer on the books, the stock attached must be subject to that equity.

The court being thus in favour of the claimants on the reserved point, judgment was entered for the dutchess of *Cumberland*. Afterwards the motion for a new trial by *Capper* and *Tucker*, was argued upon the evidence, and the court being of opinion that the matter required another examination, awarded a new trial as to them. Judgment was entered for the *United States* as to the eight shares unclaimed.

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Philadelphia, Saturday, March 30.

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HECKER *against* JARRET.

When a court has jurisdiction of the action, their officers are not responsible for errors in the process.

THIS was an appeal from the decision of Judge *Brackenridge* at a Circuit Court for *Northampton* in *June* 1809.

It was an action of trespass and false imprisonment against the defendant, who was formerly sheriff of the county of *Northampton*. Plea *non cul.*, with leave to give the special matters in evidence.

Supposing a single judge of the Common Pleas to have a right upon a *habeas corpus* to discharge a defendant who is in execution upon process from that court, still if he does it without notice to the plaintiff, the proceeding is void, and the defendant may be retaken in execution.

Upon the trial of the cause it appeared in evidence, that a judgment had been entered in the Common Pleas against *Hecker* at the suit of *Leonard Engle*, and that an execution in the form prescribed by the act of 21st *March* 1806 issued on the 4th of *May* 1807, upon which the defendant committed *Hecker* to gaol, returning to the writ, that *Hecker* had been unable to satisfy him that he had lands and tenements goods or chattels in his bailiwick whereon the debt and costs could be levied. On the 10th of *June* a *habeas corpus* under the act of 1785 was issued to the gaoler by Judge *Cooper*, one of the associate judges of the Common Pleas, upon which *Hecker* was brought up, the gaoler returning that he was in custody under the above execution, and two executions from justices of the peace, which had been lodged as detainers. The judge discharged him from all, indorsing upon the *habeas corpus*, that the two executions from justices had been served after the return day, and that it appeared to him *from the affidavit of Hecker* that he had offered to produce personal and real property to the sheriff to satisfy the debt in *Engle's* execution, a deed for the land on which *Hecker* resided being also shewn to the judge. On the 28th of *July* the defendant retook him under the same execution, and committed him to gaol a second time. The same judge issued a second *habeas corpus* on the 30th, upon which *Hecker* was again brought before him, and the sheriff heard in opposition. Upon this hearing the judge remanded *Hecker*, certifying in

Qu. Whether the discharge of a defendant, in consequence of a void order by a judge, will amount to *a voluntary escape*, as it respects the sheriff?

If a defendant upon being first taken in execution, omits to shew property to the officer upon which he may levy for the debt, and he is afterwards illegally discharged and retaken upon the same execution, an offer to shew property is then too late.

Qu. Whether the acknowledgment of a deputy sheriff of things done by him in the course of his office, is evidence against the sheriff?

The *habeas corpus* act of 1785 extends to commitments under civil process

his order that the sheriff by letter had stated that the defendant had no property on which he could levy, which statement was also corroborated by the declaration of the deputy. These were the arrests and imprisonments complained of, which the defendant justified under the execution.

The material question of fact for the jury was the offer of property; as to which it was admitted that *Hecker* lived on a tract of land which belonged to him; but there were thirty-two judgments against him to an amount greatly beyond its value, and it did not appear that he had offered it to the sheriff. It was proved that he had offered a mare &c. to the sheriff prior to the first arrest; but it was not shewn to have been his property, and he had previously asserted it to be his father-in-law's. His counsel offered evidence of declarations by the sheriff's deputy who took *Hecker* to gaol the second time, that he had then offered him property to levy upon; but the judge overruled the evidence, upon the ground that not the declarations of the deputy, but his acts only, were evidence against the sheriff.

The points of law made for *Hecker*, were that the writ under which the arrest was made, was void by the act of 13th *April* 1807, which repealed the act of 21st *March* 1806, and therefore the arrest was illegal and the discharge by the judge was proper. That at all events the second arrest after the discharge was unlawful. And that supposing the process valid in the first instance, the sheriff had no right to take the body, it being his duty first to levy upon even incumbered land.

His honour charged in favour of the defendant upon all the points, and the jury accordingly found for him. A motion for a new trial was then made by the plaintiff, which the judge overruled, being desirous that the question should be settled in bank.

S. Ewing for the plaintiff contended that the decision of the Circuit Court had been erroneous for several reasons. 1. Because the execution was void, having issued under a law which had been repealed, and therefore the taking by the sheriff was a trespass, and Judge *Cooper* had a right to discharge. 2. If he had that right, the sheriff could not retake.

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3. If he had not that right, the sheriff having permitted *Hecker* to go at large, it was a voluntary escape, after which he could not retake. 4. That under the acts of *March* 1806 and *April* 1807 no *ca. sa.* could be executed, until the return of *nulla bona*. 5. That the declarations of the sheriff's deputy should have been received as evidence against the sheriff, that property had been offered previous to the second arrest.

1. The writ was issued on the 4th of *May*, under a law which was repealed as to the form of execution on the 13th of *April*. 7 *St. Laws* 567., 8 *St. Laws* 297. It was wholly void. The execution cannot be considered as awarded by the court, but as taken out by the party; and therefore it gave no authority to hold the defendant. *Gilb. on Executions* 82. Under such circumstances a judge of the court had a right to discharge the defendant, in the same manner as if *A* had been taken under an execution against *B*, or as if there had been no judgment, or as if an execution had issued before a *cesset* had expired. The authority is given by the 13th section of the *habeas corpus* act of 18th *Febuary* 1785, 2 *St. Laws* 241., which extends all the preceding sections relative to commitments for a criminal or supposed criminal matter, to commitments under any colour or pretence whatsoever.

2. The second point is self evident. The judge had no right to discharge, if the sheriff had a right immediately to retake. There cannot be two opposing rights, in the legal sense of that word.

3. If the judge had no right to discharge *Hecker*, his act was merely void, like that of any unauthorized individual. His order was no warrant to the gaoler to discharge him. On the contrary the sheriff must in point of law be deemed bound to disobey it, and the discharge as not a compulsory but voluntary act. It was therefore a voluntary escape, and of course it was a trespass in the sheriff to retake the defennant. *Jackson* v. *Smith* (*a*) is in point. The discharge being the act of the deputy, is of no importance; the sheriff is bound by the acts of the deputy, emphatically as to every thing which relates to the escape of prisoners. 1 *Bl. Com.* 146. He therefore finds himself in a dilemma. If the judge had a right to discharge, the second arrest was a violation of the

(*a*) 5 *Johns.* 115

habeas corpus act, and a trespass. If the judge had no right, still the second arrest was a trespass, because the sheriff was not bound by the order, but in contemplation of law voluntarily consented to an escape.

4. The act of assembly intended to exempt the person of the citizen from all liability to arrest, until it should be legally ascertained that there was nothing but the person to satisfy the creditor. The only manner of ascertaining that fact, is by the sheriff's return of *nulla bona*. Something on record is essential. The plaintiff must first issue a *fi. fa.* [TILGHMAN C. J. There is no warrant for that in the law. Suppose the defendant confesses he has no property. Most undoubtedly, the plaintiff may take a *ca. sa.* in the first instance, at his peril.]

5. The declarations of the sheriff's deputy were evidence against him. They were offered to prove a fact, that property had been tendered to the deputy, prior to the arrest, which the deputy had not levied upon, but had taken the body. The acts of the deputy no doubt bind the sheriff; and this was evidence to shew the fact of property offered, and the act of the deputy in afterwards taking the defendant. The refusal to levy on the property was an act, which was proved by the offer and the subsequent arrest.

Hopkinson for the defendant. 1. The execution was not void, and as it is a very hard objection, the court will intend a great deal to support it. The repeal of the execution clause in the act of 21st *March* 1806, left the form of execution as it stood at common law, that is, subject to any modification which the court might direct. Form became immaterial, provided the person was not taken when property was shewn. Any form consistent with that privilege was good, if the court sanctioned it; and this court will, for the protection of the sheriff, presume that they did sanction it. But grant that they did not, it was not for the sheriff to judge. The Common Pleas had jurisdiction of the cause; and where that is the case, the sheriff may justify under their process, although it is irregular and void. The *Case of the Marshalsea* (*a*) is express, that when a court has jurisdiction of the cause; and proceeds *inverso ordine* or erroneously, no action lies against

(*a*) 10 *Rep.* 76.

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the minister of the court who executes the process. To the same point, 6 *Bac. Abr.* 569. *Trespass D.* 3. 2 *Bac.* 508. *Escape A. Jaques* v. *Cesar.* (*b*) The judge therefore had no right to discharge the defendant. Independent of the *habeas corpus* act, the case is extremely plain. The execution of the court is subject but to the control of the court. A single judge is not the court; his power is in no respect final, as it would be, if he were permitted to discharge from execution. As well might he discharge from the execution of a superior court as from his own. Nor does the *habeas corpus* act give this power. It extends to commitments upon a criminal charge, and to such as are brought about by private violence unassisted by the process of a court, such as the confinement of a ward by a guardian, and the like. But there was no necessity for extending it to arrest or execution upon civil process, because such process could not be feared as an instrument of persecution, while there were already so many means of escaping from it. Supposing however that the argument is against the defendant upon these grounds, still the discharge must be deemed void, because it was *ex parte*, and was founded upon the trick and fraud of *Hecker*, as the judge himself confessed, by remanding him upon the second *habeas corpus*. The plaintiff and sheriff had no notice of the hearing. Notice to the gaoler was nothing as to the great purpose of the hearing. He knew nothing of the circumstances. The judge should have demanded the presence of the opposite party. A discharge without it, was contrary to a fundamental principle of law, and was upon this ground, if upon no other, absolutely void. This court has no means of protecting suitors from the most iniquitous oppression, but by declaring such a discharge to be of no effect.

2. The judge having no right to grant the discharge, the sheriff was intitled to retake *Hecker*. But then

3. A dilemma is contrived, to make the sheriff either way a trespasser. To this however there are two answers. First, this point was not made in the Circuit Court, and therefore cannot be made here, where the propriety of the judgment below is discussed only upon the reasons assigned. A new trial being the object, the court will not grant it upon a mere

(*a*) 2 *Saund.* 101 *y.*

refinement in reasoning. But a better answer is that the escape was not voluntary. It was brought about by the fraud of *Hecker;* and shall it be permitted to him to set up an act produced by his own deception upon the sheriff, as the voluntary act of the latter, and in this way make the fraud protect itself? There is nothing to be found in the code of either statute or common law to justify such an opinion.

4. The fourth point must be considered as abandoned. Surely the law did not intend to delay the plaintiff without some substantial reason. If the defendant has property he must shew it, or he waives his privilege. If he does not shew it, the law will presume that he has none. Until property is shewn and produced, the *ca. sa.* is good.

5. The declarations of the deputy were not evidence, because the offer to which they were said to refer, was made subsequent to the discharge, and of course after the first arrest. If the execution is well executed in the first instance, nothing afterwards can make it irregular. The second arrest was nothing but a continuance of the first; and the single question was whether at the time of the first arrest, any offer of property had been made to render it illegal. Upon this point the finding of the jury, is in effect that no property was shewn.

TILGHMAN C. J. after stating the case, delivered his opinion as follows:

The plaintiff's counsel have made four points in the argument before this court.

1. That the execution issued against the defendant was void, and therefore the sheriff was a trespasser in executing it.

2. That Judge *Cooper* had a right to discharge the now plaintiff on the *habeas corpus*, and therefore the sheriff was a trespasser when he retook him.

3. That if the judge had no right to discharge from the execution, the sheriff was guilty of a voluntary escape, in permitting the now plaintiff to go at large, and therefore could not lawfully retake him.

4. That the judge who tried the cause made a mistake in point of law, when he rejected the evidence offered by the plaintiff to prove that the sheriff's deputy had acknowledged, that the now plaintiff offered him property to levy on, after

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he had been *retaken* on the execution, and while he was carrying him to jail.

1. In order to understand the force of the first objection, it is necessary to state, that by the act of 21st *March* 1806, the form of an execution is prescribed, and it is enacted that executions shall issue in that form *and not otherwise*. By that form, the sheriff is directed to levy the debt and costs on the defendant's goods and chattels, but if he has no goods and chattels then on his real estate, and for want of both real and personal estate, then the defendant's body is to be taken &c. This act, so far as relates to the form of execution, was repealed by the act of 13th *April* 1807, which contains a provision in the fifth section, that no writ of *ca. sa.* shall issue in any case, when the defendant has real or personal estate, sufficient to satisfy the plaintiff's demand. The execution against the now plaintiff was issued according to the form of the act of 21st *March* 1806, before the repeal was known, so that this objection is of a nature so very severe as to require no favour. The plaintiff's counsel contend, that the writ was *void*, but I consider it rather as *irregular* than void. In substance it was not contradictory to the act of 13th *April* 1807; because the sheriff was not authorized by it, to take the body, if the defendant had either *personal* or *real* estate to satisfy the execution. But at all events, the sheriff was justifiable in obeying the command of the writ, because it was an action within the jurisdiction of the court who issued the execution. When a court has jurisdiction of the *action*, their officers are not responsible for *errors in the process*, and it would be of most mischievous consequence if they were. This principle is established by the cases cited by the defendant's counsel, from 10 *Rep.* 76., and 2 *Bac. Abr.* 508., *title Escape A.* These cases shew, that where a writ of *capias* issued against a *peer*, the sheriff justified an arrest under it, although it was unlawful to issue such a writ. So the sheriff may justify an arrest on a *ca. sa.* issued on a judgment *post annum et diem*, although not revived by *sci. fa.*

2. The *habeas corpus* issued by judge *Cooper* was under the act of 18th *February* 1785. The defendant's counsel have contended this act was confined to the cases of persons imprisoned on *criminal* charges. But I am of a dif-

ferent opinion. The twelve first sections of the act relate to criminal matters; but the thirteenth is thus expressed. "All the "provisions herein before made for awarding and granting "writs of *habeas corpus*, and proceeding thereon, in case of "commitment and detainer for any *criminal* or *supposed cri-* "*minal* matter, shall in like manner extend to *all cases* where "any person not being committed or detained for any cri- "minal or supposed criminal matter, shall be confined or re- "strained of his or her liberty *under any colour or pretence* "*whatever*." These words are too plain to admit of doubt. The power of discharging from an execution is a very important one, and should be exercised with great discretion. But the case is peculiarly delicate, where, as in the present instance, the prisoner's right to a discharge, depends on facts of a complicated nature. A man may have property in possession, and yet it may be so incumbered by prior liens, as to be insufficient to satisfy the execution. Or he may have declined to inform the sheriff of his property, in which case he may be fairly said to have waived the benefit of the law, which exempted his body from arrest. But I will not say that the judge had no right to discharge from imprisonment in a case of this nature. I am of opinion however, that granting his right to discharge, his proceedings were void for want of *notice* to the plaintiff in the execution. It is contrary to the first principles of justice, to deprive a man of his rights without a hearing, or an opportunity of a hearing. If a court of record should proceed in this manner, their judgment would be erroneous, and might be reversed on a writ of error. But no writ of error lies on proceedings before a judge out of court. We are therefore obliged to decide upon them, when they come before us in this collateral way. The impropriety of the proceeding on the first *habeas corpus* was manifest to the judge himself. The consequence was what might be expected, he was imposed on by *one* party, because he did not hear the *other*. Of this he was afterwards sensible, when he remanded the prisoner on the second *habeas corpus*.

3. As to the third point, I do not think we are bound to regard it, because it was not made before the judge who tried the cause. I must suppose the merits to be with the

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defendant, because the jury were of opinion, that the plaintiff informed the sheriff of no property whereon the execution might be levied prior to the arrest. The argument on which this point rests, seems to have more subtlety than strength. The sheriff does not appear to have been guilty of a voluntary escape, because in fact he did not know of the discharge under the *habeas corpus*, till after it took place. Without giving however any decided opinion on that matter, I do not think that we ought to grant a new trial, even supposing the plaintiff could make good a very refined objection, introduced *now* for the *first* time, and contrary to the merits of the case.

4. It is not necessary to decide, whether the acknowledgment of the deputy, of things done by him in the course of his office, is evidence against the principal, or whether those facts must be proved by the oaths of witnesses. It is a point on which there appears to have been some difference of opinion. But the evidence rejected in this case, was not admissible, because it was not relevant. It was of no consequence, whether property was shewn or not at the time of the second arrest; it ought to have been shewn previous to the original arrest; if that was lawful, so also was the retaking, which was only a continuance of the imprisonment. This case is not of much importance in itself; but some serious considerations have been involved in the points which were made, and supported by the plaintiff's counsel with considerable acuteness. I am of opinion on the whole, that the judgment of the Circuit Court should be affirmed.

YEATES J. concurred.

Judgment affirmed.

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THURSTON and another *against* MURRAY.

Philadelphia, Saturday, March 30.

A rule to try or *non-pros*, is in force from the time it is taken, until the cause is concluded, notwithstanding the cause may have been once tried during the existence of the rule, or continued at the instance of the defendant.

THIS cause having been tried while a rule to try or *non-pros* was in force against the plaintiffs, and the court having at the last term awarded a new trial, it was referred to their honours as a question generally interesting to the bar, as well as to the counsel in this case, whether this rule was to be considered as abrogated by the trial, or by a continuance upon the motion of the defendant.

TILGHMAN C. J. Although it seems fair that if the plaintiff has shewn himself ready to try, the rule should not afterwards be inforced against him, yet we think it will be most convenient to consider the rule as in force from the time it is taken, until the cause is concluded, because it puts both parties on the same footing. There has been a difference of opinion upon this subject, but the court now agree in adopting this as the construction of the rule.

Dallas for the plaintiffs.

Tilghman and *Ingersoll* for the defendant.

CLEMSON *against* BUSH.

Philadelphia, Saturday, March 30.

The court will not discharge a defendant out of custody upon the ground of infancy, where there is no suggestion of fraud or imposition; but will leave him to make use of that fact upon his defence.

UPON the return of a rule upon the plaintiff to shew cause why the defendant should not be discharged on common bail,

Hopkinson produced a positive affidavit of a debt due by the defendant for goods sold and delivered.

M. Levy called the plaintiff with a view of interrogating him.

TILGHMAN C. J. The court will ask any questions which they may think necessary, but not the party. You may how-

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ever propose to the court any question for the witness, and they will decide upon it.

M. Levy suggested that the defendant was but nineteen years of age at this time, and he wished to ask the plaintiff whether at the time of selling the goods, he did not know that the defendant was under twenty-one.

PER CURIAM. We do not think it proper to inquire into the defendant's age in this stage of the cause. If the defendant was under age, and he shall think proper to make that defence, the law will give him the advantage of it; but in the present stage of the business, the court think it immaterial. We do not wish to afford encouragement to persons, who knowing their own age, contract debts which they afterwards wish to get rid of. There has been no suggestion of any fraudulent artifices on the part of the plaintiff, to draw an unwary young man into improper expenses. Should such a case be presented, it may deserve consideration.

Rule discharged.

See *Madox* v. *Eden*, 1 *Bos. and Pul.* 480., *Gardiner* v. *Holt*, 2 *Stra.* 1217., *Gladman* v. *Bateman*, *Barnes* 418.

Philadelphia, Monday, April 1.

Costs of double the number of witnesses sworn, allowed under special circumstances, provided the counsel in the cause could name so many who in their opinion were material.

The COMMONWEALTH *against* WOOD and others.

THIS was an indictment against *Wood* and six other journeymen hatters, for a conspiracy. *Fifty-nine* witnesses were summoned on behalf of the prosecution, only *thirteen* of whom were called to the book; and the defendants having been convicted, the costs of the forty-six witnesses who were not called were taxed at 240 dollars, and the entire costs at 308 dollars 9 cents. From this taxation the defendants appealed.

Sergeant for the defendants, said it was a case of gross oppression, the summoning of witnesses having been left by the attorney-general to a certain *Peter Charbonnier* the prosecutor, who had been instigated by resentment to make the

case as severe as possible upon the defendants, and had summoned several persons who probably knew nothing of the cause. Nine witnesses alone had been bound over by the mayor. No inquiry was made by any one into the propriety of summoning such a mass of witnesses.

Charbonnier being sworn, said that he was told by Mr. *Franklin* the attorney-general, to summon such witnesses as he thought necessary. He had therefore made out the list, in which were about forty master hatters. He expected they would prove something. Many of them would not tell him what they could prove, and he had no way to ascertain their knowledge, but by bringing them to court.

Milnor and *Condy* for the prosecution, said that the case was in some respects peculiar. It was an indictment of seven defendants for a conspiracy, which required proof from a variety of persons as to their acts with each other, and with third persons. The conspiracy was an extensive one, and it became necessary to pursue it steadily and through all its windings. It happened that the first thirteen witnesses proved the case sufficiently, and therefore the rest were not called. But there was no evidence of oppression. The mere circumstance of there being many witnesses who were not called, is nothing. *De Benneville* v. *De Benneville*. (*a*) It was impossible to say how many would be wanted.

PER CURIAM. The number of witnesses summoned seems extravagant. We would not encourage the practice of the public prosecutor's permitting the man who institutes the prosecution, to summon as many as he pleases. This case is in some respects of a singular nature. There were seven defendants, and they were connected with others not defendants. The court will therefore allow the costs of *twenty-six* witnesses, double the number sworn, provided the counsel can name so many, who in their opinion were material.

(*a*) 1 *Binn.* 46.

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Philadelphia, Tuesday, April 2.

There is no necessity for a *scire facias* to revive a judgment in foreign attachment.

COOKSON and WADDINGTON *against* TURNER.

THIS was a foreign attachment, in which judgment was entered at *March* term 1797. A writ of inquiry was executed in *February* last, when damages were assessed at 2808 dollars; and a motion was now made to set aside the inquisition, upon the ground that the judgment had not been revived by *scire facias post annum et diem*.

Meredith and *Rawle* in support of the motion. The statute of 13 *Ed.* 1. *c.* 45., requires a *scire facias* in all judgments in personal actions; and the plaintiff cannot have a writ of inquiry after more than a year's delay upon an interlocutory judgment, without it. *Haw* v. *Cuton*, 6 *Bac. Ab.* 107., *Scire Facias C.* As the present attachment was laid in the plaintiffs' hands, it was against equity in them to proceed without giving us notice.

Dallas and *Tilghman* contra. The rule of reviving a judgment by *scire facias* before execution, was intended to prevent a surprise upon the defendant; *Mitchell* v. *Cue*; (*a*) and therefore it does not apply to the case of a foreign attachment, which is a proceeding against an absentee, who if he were present, would not be permitted to give evidence to the jury of inquiry, *M'Clenachan* v. *M'Carty*; (*b*) and whose debt to the plaintiff, the garnishee is not permitted to dispute. A writ of *scire facias* would answer no purpose, because there is nobody to warn.

PER CURIAM. We are of opinion that the case of a foreign attachment differs from other actions. The defendant never was in court; and as there is no person to be warned, a *scire facias* is not necessary.

Motion refused.

(*a*) 2 *Burr.* 660 (*b*) 1 *Dall.* 375

3b 417
3s r583
8s r340
7 w 65
2wn264
4ws 26
5ws178
11 405
35 418
47 350
95 299
126 101

VANATTA *against* ANDERSON.

IN ERROR.

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Philadelphia, Tuesday, April 2.

Under the general power of the Common Pleas to regulate its practice, it has authority to make a rule, requiring of defendants an affidavit of defence, and directing judgments to be entered against them, if the affidavit is not filed within a certain time.

UPON a writ of error to the Common Pleas of *Philadelphia*, it appeared that a judgment had been signed against *Vanatta* the defendant below, for want of an affidavit of defence, agreeably to the following rules of that court: "*April* 17th, 1809. It is ordered that in all actions brought or "to be brought in this court, of debt or contract, the plaintiff "shall be at liberty to direct judgment of course to be en- "tered at the third term, unless the defendant or some per- "son for him or her, shall make affidavit and previously file "the same in the clerk's office, that to the best of his or her "knowledge and belief there is a just defence in the said "cause; and if the defence be to part only, the defendant "shall specify in such case the sum in dispute, and judgment "shall be entered for so much as shall be acknowledged to "be due to the plaintiff, and the trial shall proceed for the "residue of such debt or demand; and in all actions of debt "and contract now at issue on the docket of the court of "Common Pleas, judgment shall be entered at *September* "term next, unless affidavit of defence be previously filed in "the prothonotary's office, in the manner aforesaid." On the 13th *July* 1809, the court made a supplemental rule, that "the rule of the 17th *April* should not extend to any suit "brought and depending previous to that day;" and on the 31st *March* 1810, they made an order, that "where a judg- "ment had been entered at the third term for want of an affi- "davit of defence, and a declaration had not been filed at "the second term, the judgment was irregular." The error was assigned in the entering of the judgment, upon the general ground that the Common Pleas had no authority to make such a rule.

Browne, *M. Levy*, and *Ingersoll* for the plaintiff in error, argued, 1. That the rule was contrary to the constitution. 2. That it was contrary to one or more acts of assembly. 3. That it was unjust and inequitable in its operation, and the court below had no authority to make a rule of that character.

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1. The constitution secures to every person who asks it, a trial by jury, upon the same terms on which it was given before. In this case the declaration was filed, and the cause was at issue for the jury. Before the constitution, there can be no doubt, that the defendant would have been intitled to a trial; and if he may now be put to an oath, in order to obtain it, it is easy to perceive that this may be made a precedent to destroy the right in all cases. Trial by jury does not remain as heretofore, unless that trial may be had upon the same terms, and in the same cases as heretofore.

2. The legislature did not intend to trust the Common Pleas with this kind of judicial legislation. The Supreme Court may have a colorable right to make such a rule, because they are expressly impowered by the act of 25th *September* 1786, 2 *St. Laws* 471., to make and establish such rules for regulating the practice of this court, and *expediting the determination of suits*, as they in their discretion shall judge proper. And the same power is given in relation to the Circuit Courts by the act of 20th *March* 1799. 4 *St. Laws* 367. But the Common Pleas are not invested with so extensive a power. They may have by implication a power to regulate their practice; but that does not comprehend the power in question. The practice consists of such rules as regulate the time and order of certain proceedings preparatory to the final decision of a cause by court or jury; but it is not the final decision of the cause itself. If it be, then under the authority to make rules of practice, lies concealed a most dangerous authority to appoint the mode of trial, and to take away jury trial altogether. Even this court, notwithstanding the act of assembly, have not established the affidavit rule, as a general rule of the court. They have inforced one of the same kind against all the attorneys of the court who agreed to abide by it, but never against those who refused to make that agreement. It approaches too near to the trial of a cause, to exact an oath as to the merits from the defendant, or in other words, to interrogate him, as upon a bill in chancery. The legislature have negatived the right to purge the defendant's conscience in any other case, by requiring that an affidavit of defence shall be given to intitle

him to a special jury; 2 *St. Laws* 691.; and the act of 21st *March* 1806, 7 *St. Laws* 561. *sec.* 5., is also strong to this point, as it recognises a trial by jury in every case except where a judgment is confessed, the plaintiff is nonsuited, or there is a judgment by default against the defendant, for want of appearance. There is no warrant in the practice of the *English* courts for such a judgment as this. 3 *Bl. Comm.* 395-6.

3. The rule is unjust and unequal. It requires the defendant to swear, where he may be wholly ignorant of the cause of action. The declaration is of no importance. It need not be filed until the second term, which may last until the day before the third term, when the affidavit must be entered; and even when filed, it may be and frequently is so general as not to indicate the cause of action. It is a snare for the consciences of men. Where you sow oaths, you reap perjuries. It is a convenience to an intrepid swearer, it is a denial of justice to a timid one. It compels defendants to sanction their defence by an oath, under the pretence of avoiding delay to the plaintiff, but it does not compel plaintiffs to sanction their claim by an oath, to avoid vexation and expense to the defendant. It is the exercise of an inquisitorial power, with no other view than in a small degree to mitigate the evils of delay, when a strict and punctual execution of the law would be a much more certain and less dangerous remedy. If the Common Pleas have a right to make rules of practice, still they cannot institute any rules which are contrary to equity.

Sergeant for the defendant in error. The present was the case of a sum certain due at a certain day by express covenant, the *narr.* was filed, the issue was joined, and judgment was entered for the plaintiff, because the defendant would not swear that he believed he had a defence. It is a fair case for the discussion of the rule.

1. A repeated reference to the constitution, where its application to the case in question is doubtful, and where the importance of the cause will not warrant the interposition of this high authority, is a great injury to the constitution itself; it weakens its effect, by diminishing the respect in which it

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is held. Certainly the constitution did not mean that a defendant who did not believe that he had a defence, that he had something to try, should have the benefit of a jury trial. A rule to plead in eight days, would upon the ground which has been taken, violate the constitution, because the party had six weeks before it was passed. The *oath* in this point of view is of no importance; the interposition of any new form or ceremony may equally be the subject of complaint; and if the complaint be just, all the rules of practice must be considered as unchangeably fixed by the constitution, as they stood at that epoch. This point cannot be maintained.

2. The expediency of the rule does not appear to be a question before this court. It was made at the instance of the attorneys of the Common Pleas, and the judges of that court are undoubtedly the best judges of its expediency, and whether the good which results from it is counterbalanced by the hardship and inconvenience. [TILGHMAN C. J. I do not think you need labour the question of hardship. If the court have power to make the rule, they are responsible for the exercise of it.] That is certainly the only point. I assume it then as an incontestable principle, that the Common Pleas, and every other court, has by its very constitution as a court, the right to make rules for the regulation of the practice. It would be impossible otherwise to proceed a single step without a legislative direction. The acts of 25th *September* 1786, and 20th *March* 1799, are therefore merely declaratory. They give no power which the judges of this court would not have had without them; and if under those acts this court would have authority to adopt such a rule as this, the Common Pleas may do it without such acts. To obviate this argument, it is said that the rule is not a rule of practice. But if not, it is difficult to say what it is. It regulates the business of the court in two important points, the trial of issues, and the signing of judgments. If it is not a rule of practice, because unless it is observed a final disposition is made of the cause, then rules to plead, to declare, to try, are not rules of practice, because the penalty of neglect is a judgment of some sort or other. It has been adopted as a rule of practice in this court since 1795. If it is of a nature to change the fundamental rules of law, or the principles of evi-

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dence, or to affect the property of a suitor, upon what ground has this court inforced it against those who signed the agreement, and many too who never signed the agreement, but have come to the bar since it was made? If it is not a rule of practice, it is a rule interfering with the absolute rights of a party; and whether attorneys agree to it or not, this court cannot inforce it. The judges have also inserted it among the first rules of practice instituted for the Circuit Courts; which was in effect a decision by all the judges that it was a rule of practice. What right of the defendant does it abridge? It only imposes a term, which may be complied with without violating the most tender conscience. It is referred to his own conscience, whether he has a just and legal defence, (which in fact are the same thing) according to the best of his knowledge and belief. No one could say that it was a violation of any right, if the defendant were called upon to file a certificate in writing, that he had a defence; the only objection is therefore to the oath. But as to that, in numerous cases, both the legislature and our courts have thought proper to demand it; the former, to obtain a *certiorari* to a justice, to appeal from an award of arbitrators, to put a cause upon the special jury list; the latter, in cases of bail, in foreign attachments, and in all cases of dilatory pleas. The act of assembly says that any person may issue a foreign attachment against the effects of an absentee, but still, if he will not swear to his cause of action, the attachment will be quashed. The case of dilatory pleas appears to be decisive. We have no statute requiring the defendant to swear to them, but this court has nevertheless adopted it as a rule of practice since the year 1788. In fact the rule in question is in substance no more than a determination by the court to consider all pleas and proceedings on the part of the defendant as dilatory, unless he swears to a defence, which is swearing that his object is not delay. In *Barry* v. *Randolph* (*a*) this court were of opinion that the Common Pleas might impose upon the party who appealed from the award of arbitrators, a term which was not imposed upon him by the act of assembly; and they directly affirmed the right of that

(*a*) *Supra*. 277.

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court to make rules of practice for the government of all cases within their jurisdiction. The affidavit rule, whatever may have been its evils, has been of infinite convenience, and to decide at this day that it is illegal, would reverse a vast number of judgments which have been signed under it.

TILGHMAN C. J. This is a writ of error to the court of Common Pleas of the county of *Philadelphia*, and it appears that judgment was entered under a rule of that court, because the defendant did not, before the third term from the commencement of the action, make an affidavit, that "to the "best of his knowledge and belief, there was a just cause of "defence in the said action." It is contended on behalf of the plaintiff in error, that the court of Common Pleas had no power to make this rule, because it is not within the general power which every court of record possesses, to make rules for the regulation of the practice, and because it is contrary to the constitution of the commonwealth, by which it is provided, that the trial by jury shall be as heretofore.

As to the objection on the ground of the constitution, it does not appear to me to be well founded. The rule makes no alteration in the trial by jury, but only provides that previous to the trial, the defendant shall swear or affirm, that to the best of his knowledge and belief, he has a just cause of defence. There has been a rule of long standing, that a dilatory plea, shall not be put in without oath. This rule is not complained of; and yet, as far as the constitution is concerned, it is as much a violation of the trial by jury, as the other; for the defendant has as much right to insist on the trial of a *dilatory* plea, without oath, as a plea to the merits. The constitution makes no difference between them, nor does it make any mention either of one or the other.

The second and more difficult point, is whether this rule falls within the general power of the court to make such regulations as shall facilitate the transaction and despatch of business. Much has been said concerning the policy and effects of the rule. I have no doubt but it was intended to do good, and has done good, by expediting judgments in cases where there was no ground for dispute. Nor have I any doubt, but that in some cases it has produced perjury.

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There will be perjury, where there are oaths, but this does not prove that all oaths are useless. The first rule of this nature, in any of our courts, originated in *this* court, in *September* 1795, when all the attorneys except two, signed an agreement, that they would confess judgment, unless the defendant made an affidavit of defence, similar to that prescribed in the rule of the Common Pleas. This agreement has been frequently inforced, except against those who refused to sign it, and who never *gave* or *took* any judgment under it. Some years after the making of this agreement, with full experience of its effects, the judges of this court made a similar rule for the Circuit Court, which was held by them, and it was practised under for many years without objection. It is true, that this court is expressly authorized by the sixth section of the act of 25th *September* 1786, to make such rules for regulating the practice and expediting the determination of suits, as the judges shall think necessary. I do not know that the Common Pleas have such power by act of assembly; but yet it is not denied that they have power from the nature of their constitution, to make rules for the regulation of their practice. They have always done it, it seems necessary that they should do it, and it would disturb the property and peace of the country to deny it. But is this properly a rule for regulating the practice? It is not very easy to mark the line, where the regulation of the practice ends. But certainly this court have conceived it to fall within that description, otherwise they ought not to have inforced the agreement of the attorneys, nor to have made the rule for the Circuit Court which I have mentioned. Considerable deference also, is due to the almost unanimous opinion of the bar. To regulate the practice, is to prescribe the manner of conducting the proceedings in courts of justice, the time of putting in the several pleadings, &c. Regularity, justice and despatch, are the great objects of the rules, and it is certain that in some cases oaths have been thought necessary. The case of dilatory pleas has been mentioned. By the twenty-fifth rule for regulating the practice made by the presidents of the several courts of Common Pleas, soon after their organization under the present constitution, if a warrant of attorney to confess judg-

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ment be above ten years old, judgment cannot be entered without an *affidavit* of the due execution of the warrant, the nonpayment of the debt, and the life of the party. The oath of the plaintiff is necessary for holding the defendant to special bail; and so it is, for supporting a foreign attachment, although there is no act of assembly requiring such oaths. In matters which fall within their jurisdiction, the power of the court of Common Pleas is as full, as the power of this court. It is remarkable that many regulations of the practice, with respect to bail, dilatory pleas &c., which were introduced into *England* by *statute*, have been the objects of *rules of court* in this country. They have been generally acquiesced in. Should any of them be found inconvenient, it is in the power of the legislature to annul them. But it will rarely happen, that a court should persist in keeping a rule in force, after experience of its ill effects. The *consequences* of declaring this rule to be against law are not to be disregarded. Hundreds, nay perhaps thousands of judgments would be liable to reversal. If the rule was *clearly void*, we should have no right to consider consequences; but if the question is doubtful, it is our duty to do so. If the matter was to be now proposed for the first time, if this court were deliberating whether they should make a rule of this kind, I should have great hesitation. But after all that has passed, I cannot say that the rule is void. I am therefore of opinion, that the judgment should be affirmed.

YEATES J. concurred with the Chief Justice.

BRACKENRIDGE J. A delay of the plaintiff's suit is given by the common law to a certain extent. This, with an eye to an accommodation with the adverse party, by giving time to make terms or satisfy. This is called an *imparlance*, or opportunity of speaking with him. An *appearance* being made, declaration filed, and an imparlance prayed and allowed, a plea can be demandable at the next term; which plea, unless dilatory, as to the jurisdiction of the court from the place where, or the thing which, or in disability of the person of the plaintiff, or in abatement for misnomer &c., need not be on oath, which is not enjoined or imposed, or called for, unless to matters of fact short of the merits; and

this exception as to dilatory pleas, and which goes merely to the putting off the trial of the merits, and gaining time, is by act of parliament. Under this act of parliament extended here before the revolution, or depending solely on the rule of the Supreme Court, an oath in the case of a dilatory plea has been demandable from an early period; and it may be proper that it should be so, from whatever authority derived. But farther than what respects a dilatory plea, I am not clear that it has been expedient to go. Nor do I think the act of the legislature impowering the court to make rules and regulations, ought to be construed as extending to matters that require an oath of the party *respecting the merits;* but rather to the practice with respect to the preparatory steps of *compelling an appearance*, *obtaining a plea*, *and trial of the issue*. But the construction put upon it by the courts, has been different; and under such circumstances as render such construction acceptable, and in which there seems to have been for a great length of time an acquiescence. The mischief that would follow on declaring what has been done under those rules void, would amount to a general inconvenience, to which consideration, mischief in a particular case must give way.

As to what has passed therefore under these regulations, there must be silence; more especially as it must be understood, that the power of the court to make such rules is considered as *questionable only*, not as clearly unfounded. But if common right is against the rule, may it not be advisable for the bar, under a due regard to the weakness or wickedness of human nature, to consider the expediency of withdrawing that agreement which would seem to have given rise to the rule. Notwithstanding a precedent of such continuance, may not a revision of the rule by the courts themselves be considered as still open? Certain it is that the making *an affidavit of defence*, is embarrassing to a tender, and insnaring to a hardy conscience. For though it is to *a belief of a defence* that a defendant swears, yet in many cases it may be difficult to know what to believe; and he will always be disposed to deceive himself into *a belief*, for the sake of procuring a delay. This is a leading into temptation.

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VANATTA v. ANDERSON.

A distinction seems to be made in some of the rules, between swearing to *the belief*, and swearing *positively;* a distinction which has no foundation in common sense, or in common law. For when a man swears positively, all he means to say, is that he *positively believes it;* and on a prosecution for perjury, the only question can be, whether there is reason to suppose that he did believe it. The effect of this mode of expression, goes no farther than to the certainty or uncertainty of the persuasion of his own mind as to the truth of what he swears.

The appeal to the conscience in this way took its rise in the inadequacy of the judiciary establishment to reach the trial of a cause, by the common rules, in a reasonable time; and was as a substitute to a certain extent, for what the legislature ought to have done, by the constitution of the courts, rendering it possible to reach the trial of causes in a reasonable time; and it might be advisable to leave it to this natural and proper remedy. The multiplication of oaths is an argument against laws that require them, and so it ought to be against rules in the administration of the laws. The frequency of oaths detracts from their solemnity. They become a matter of course. Customhouse oaths are proverbial. Under the Circuit Court law, and the rules introduced to supply the hardship of delaying a judgment, there was a great deal of this affidavit making; and it was a good reason amongst others why that court should be abolished.

Judgment affirmed.

3o 427
5w 336

PERLASCA *against* SPARGELLA.

1811.

Philadelphia, Tuesday, April 2.

IN ERROR.

ERROR to the Common Pleas of *Philadelphia.*

If special bail has been entered at the commencement of a suit, in a sum sufficient to secure the amount which has been awarded by arbitrators in the cause, it is not necessary for the defendant to enter special bail *de novo*, to intitle himself to a stay of execution for thirty days after judgment, according to the 11th section of the act of 20th *March* 1810, and the seventh section of the act of 21st *March* 1806.

An amicable action was instituted on the 8th *December* 1810 by *Spargella* against the plaintiff in error, in which special bail was entered in 800 dollars. A rule of arbitration was taken on the 14th, the arbitrators appointed on the 26th, and on the 11th of *January* an award was filed in favour of the plaintiff for 404 dollars and 60 cents. On the 31st of *January* the recognisance of *Ira Allen* as special bail within the act of 21st *March* 1806, was taken, and on the same day excepted to by the plaintiff; and on the 4th of *February* the plaintiff took a *fi. fa.*, which the Common Pleas after argument upon an application by the defendant, refused to set aside.

The error was assigned in the issuing of execution, before thirty days from the 11th of *January*, when judgment was signed upon the award.

M. Levy for the plaintiff in error. The eleventh section of the act of 20th *March* 1810 provides, that where judgment has been rendered for a sum of money awarded by arbitrators, the like stay of execution shall be had under the like regulations, as is provided by the seventh section of the act of 21st *March* 1806; 9 *St. Laws* 149; and this section enacts, that in all suits instituted either by *capias* or *summons*, execution shall be stayed, if exceeding 400 dollars, twelve months from the first day of the term to which the original process issued is returnable, if the defendant is a freeholder worth the amount of the judgment clear of incumbrance; or if he is not a freeholder, execution may immediately issue, unless the defendant *enter surety in the nature of special bail*, in which case there shall be a stay for thirty days; and if within that period he shall give security for debt and costs, he shall have the same stay as a freeholder. The same section puts *amicable* actions upon a similar footing, unless otherwise provided in the agreement. 7 *St. Laws* 563. The

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only question is whether if special bail is entered at the beginning of a suit, it does not supersede the necessity of entering it after the suit is ended? And why should it not? It is precisely the same security, at whatever time it is entered, and is of the same advantage to the plaintiff. The legislature did not intend that if special bail had been already entered, the defendant should procure it a second time. It would be a vain thing as it respects one party, and an oppressive one as to the other. Though it may be within the letter, it is not within the spirit and meaning of the law. There was no design that the special bail should be cumulative, but only that there should be bail for the forthcoming of the defendant's person, while he was seeking security for debt and costs; and it will answer that purpose if it has been entered at the beginning of the suit.

A. Shoemaker for the defendant in error. The privilege of a stay for thirty days is one to which the defendant below was not intitled at common law. The act gives it to him, and he must take it upon the terms of the act. It is enough that the law is so written, and it has been the practice to construe this arbitration law strictly. But there is a substantial reason for it. Bail which was not excepted to at the commencement of the suit, may become bad before the end of it. It may be insufficient for the debt; and the legislature in postponing the execution after a debt was ascertained, did not mean that the plaintiff should incur the least risk. In fact the defendant below shewed this to be his own construction of the law, by entering bail after judgment; but this having been excepted to and not justified, was of no effect.

TILGHMAN C. J. This is a writ of error to the court of Common Pleas of *Philadelphia* county. The error complained of, is in issuing the execution. It was an amicable action entered by agreement on the 8th of *December* 1810, and submitted to arbitration. On the day of entering the action, special bail was entered by the defendant in 800 dollars. On the 11th *January* 1811, a report of the arbitrators for 404 dollars 60 cents in favour of the plaintiff was filed, and judgment entered; and on the 4th *February* 1811, the plain-

tiff took out an execution. The plaintiff in error, who was defendant below, contends, that having entered special bail, he was intitled to a stay of execution for thirty days after the judgment. But this is denied by the defendant in error, who says that the law gave no stay of execution, because security in the nature of special bail was not entered *after* the judgment.

It is enacted in the eleventh section of the act regulating arbitrations (20th *March* 1810,) that where judgment has been rendered for any sum of money, " the like stay of exe- " cution shall be had under the like regulations, as are pro- " vided by the seventh section of an act, intitled an act to " regulate arbitrations and proceedings in courts of justice, " passed 21st *March* 1806." The provision in the seventh section of the act referred to, is as follows. In all suits instituted by capias or summons, the execution shall be stayed on the judgment, if it shall not exceed 200 dollars, six months; if not exceeding 400 dollars, nine months; and if exceeding 400 dollars, twelve months from the first day of the term to which the original process was returnable, if the defendant in the opinion of the court, is possessed of a freehold estate, worth the amount of such judgment *clear of incumbrances;* but if the defendant is not a freeholder *as aforesaid*, then execution may issue *immediately*, unless the defendant shall enter *security in the nature of special bail*, in which case there shall be a stay of execution thirty days; and if at or before the expiration of that time, the defendant shall give security for the amount of debt interest and costs, such defendant shall be intitled to the same stay of execution as if he was a freeholder, " and the like stay of execution shall be had upon " judgments obtained in *amicable actions*, unless when it is " differently provided for by the parties in their terms of " agreement, counting from the date of the agreement."

The intent of this provision is very plain. If the defendant is a freeholder, possessed of *clear* real estate to the amount of the judgment, he is intitled to the stay of execution above mentioned, without giving any kind of bail or security. But if he is not *such a freeholder*, he is subject to *immediate* execution unless he gives security *in nature of special bail.* If such security is entered, the plaintiff is suffi-

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ciently safe, and there shall be a stay of execution for thirty days from the judgment, in order to give the defendant time to enter security for debt and costs, if he shall think proper. But in the case before us, special bail was entered not after the judgment, but at the commencement of the action. It is out of the *letter*, but clearly within the *spirit* of the law. For what can be the occasion of entering security *in nature of special bail*, when *special bail itself* has been entered? What advantage will the plaintiff gain by it? It increases the costs, and oppresses the defendant for no useful purpose. This provision was made for the benefit of the defendant, and is intitled to a favourable construction, as far as it can be made without injuring the plaintiff. If the special bail entered before the judgment, was not in a sufficient sum to secure the amount recovered, there might be reason for entering security in the nature of special bail *after* the judgment. But that is not the present case. When such a case shall arise, it will be time enough to give an opinion on it. Here the bail was much more than sufficient. I am therefore of opinion that the defendant was intitled to a stay of execution for thirty days after the judgment, and consequently the execution was issued erroneously.

YEATES J. I am unfortunate enough to dissent from the construction of the law as insisted on by the counsel of the plaintiff in error. I am bound to express my own opinion. The eleventh section of the "act regulating arbitrations" passed 20th *March* 1810, incorporates under certain provisions, the seventh section of the arbitration law of the 21st *March* 1806 as to the stay of writs of execution upon judgments. 7 *St. Laws* 563. The words of this seventh section are very general and comprehensive, and include "all suits instituted "either by capias or summons in any court of record within "this commonwealth."

The now plaintiff in error, who was the defendant below, does not appear to be a freeholder, and therefore under the particular circumstances of the case, would be intitled to a stay of execution of twelve months, counting from the 8th *December* 1810 when the suit originated, provided he has conformed to the act. In such case, the law directs, "that

"execution may *immediately* issue, unless the defendant "shall enter surety in the nature of special bail, in which "case there shall be a stay of execution for thirty days; and if "at or before the expiration of that term, the defendant "shall give security for the amount of debt interest and "costs, such defendant shall be intitled to the same stay of "execution, as if he was a freeholder."

It is asked why shall the defendant enter special bail a second time? The law intended to grant a benefit to the debtor; but such a construction would be oppressive on him. It is answered that he thereby intitles himself to a stay of execution for thirty days, during which period he may provide other security for the payment of the debt interest and costs. The special bail first entered was, that the defendant should pay the condemnation money and costs, if cast in the action, or surrender himself a prisoner to the sheriff of the county. But by this new security he elects to have the benefit of the stay of execution; and the words "that exe-"cution may *immediately* issue unless &c." are susceptible of no other construction. The entry of special bail to the action in its commencement, does not of itself prevent the plaintiff from issuing execution after judgment, within the terms used by the lawmakers. Should this answer be deemed unsatisfactory, I have only to remark, that the intention of the legislature, whatever may be its grounds, is clearly and distinctly expressed in the clause under consideration. 1 *Black. Com.* 94, *Christian's note* 21. It embraces all suits originating by capias, whether the defendant be admitted to bail, returned in custody, or his appearance be accepted. Such was the idea of the defendant's counsel in the Common Pleas, when *Ira Allen* entered into a recognisance after the judgment; but he was afterwards excepted to, and formally waived. It was therefore incumbent on the defendant below to find sufficient bail to intitle himself to the benefit of the act; and on failure thereof, I think the court were warranted in the award of execution. I am for affirming the judgment of the court of Common Pleas.

BRACKENRIDGE J. expressed his concurrence with the Chief Justice.

Execution set aside.

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Philadelphia, Monday, July 22d.

BEALE *against* DOUGHERTY.

IN ERROR.

It is not necessary that an appeal from the judgment of a justice should be entered on the prothonotary's docket within twenty days after the judgment. The appeal must be made within that time; but the entry on the docket is in time on any day before the next term of the Common Pleas.

A writ of error lies to an order of the Common Pleas, in the nature of a judgment, dismissing an appeal from the judgment of a magistrate.

THE plaintiff in error appealed from the judgment of an alderman on the 24th of *August* 1808, the day on which the judgment had been rendered against him for 50 dollars and 70 cents; and at the same time he gave security in the nature of special bail; but the appeal was not entered on the docket of the prothonotary of the Common Pleas of *Philadelphia* county, until the 14th of *September*, twenty-one days after the judgment, and five days before the first day of *September* term. The president of the Common Pleas, being of opinion that the appeal had not been entered within the time limited by act of assembly, on motion ordered it to be struck off, upon which the present writ of error was brought.

Sergeant for the plaintiff in error, argued that it was sufficient if the appeal was entered before the magistrate within twenty days after judgment, and certified to the common Pleas any time before the next term. The act of 28th *March* 1804, section 4., 6 *St. Laws* 385, gives to either party the right to appeal from the magistrate's judgment "within twenty days after judgment being given;" and the appeal is complete when the party appellant is bound before the magistrate with surety in the nature of special bail. That part of the act which relates to entering the appeal on the prothonotary's docket has no limitation of time; it merely directs that "the whole proceedings in case of appeal, shall be certified to the prothonotary of the proper county." The duty must therefore devolve upon that person who has the power, that is, the magistrate; and if there were any laches in this case, they were of the magistrate not the party. Besides, the magistrate is to *certify the appeal*, which shews that it is complete before him. The act of 20th *March* 1810, section 4, 9 *St. Laws* 210, seems to be declaratory of the true meaning

* This and the remaining causes in *March* 1811 were argued in that term; but the opinions were not delivered until the day mentioned in the margin, to which the Supreme Court for the eastern district stood adjourned for the purpose of giving opinions.

of the preceding acts, that if the appellant enters bail to appeal within *twenty* days, such appeal shall be effectual, "in "case such party appellant shall file the transcript of the re- "cord of the justice in the prothonotary's office on or before "the first day of the next term of the court of Common Pleas "of the proper county, after entering such bail as aforesaid." What purpose does the entry before the succeeding term, answer? It is not the basis of any proceeding in the Common Pleas until the term arrives; and it is therefore a strictness without any use, and without any warrant in the act, to require an entry on the docket before that time. The decisions of Judge *Wilson*, in the adjoining district, have been directly contrary to those of Judge *Rush*, upon this point.

C. J. Ingersoll for the defendant in error. A great number of appeals have been dismissed upon the ground taken by the court below, in relation to the present, namely, that there is no appeal *to* the Common Pleas, until that court is possessed of the cause by an entry on its docket, which is supported by the case of *Plowman* v. *Abrams* (*a*); and a reversal here will therefore be attended by the reversal of many other such orders. But there are other questions. Has there been a final judgment in this case, upon which a writ of error will lie? [TILGHMAN C. J. The court have so decided in the *Commonwealth* v. *The Judges of the Common Pleas*. (*b*)] The court have not however decided that this is a case in which a writ of error is the proper remedy. Error does not lie where the proceedings are not in any one stage of them according to the course of the common law. They may have been so in this instance in the court of Common Pleas, but they were not so before the magistrate, and that is decisive. *Melvin* v. *Bridge*. (*c*) *Certiorari* is the proper remedy. *Drowne* v. *Stimpson*. (*d*) What judgment will this court render in case of a reversal?

Sergeant in reply. The cases from the *Massachusetts Reports* do not apply. In those cases the judgment below was given under a special law, which did not extend to the su-

(*a*) 1 *Dall.* 316.
(*b*) *Supra* 273.
(*c*) 3 *Mass. Rep.* 305.
(*d*) 2 *Mass. Rep.* 445.

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perior court, and therefore the superior court could not take jurisdiction by writ of error, because it could not render a right judgment, nor correct the error, if the court below were wrong. But the act of assembly settles the question. It directs that after the cause is entered on the docket of the Common Pleas, "it shall take grade with, and be subject to "the same rules as other actions," and therefore it becomes an action at common law. 6 *St. Laws* 386. If this judgment is reversed, the appeal is thereby restored to the docket, and the record being remitted to the Common Pleas, the parties will proceed as if it had never been dismissed.

TILGHMAN C. J. In this case there was an appeal from the judgment of a justice of the peace, and security given according to law, on the same day the judgment was rendered, 24th *August* 1808. But the appeal was not entered on the docket of the prothonotary of the court of Common Pleas until the 14th of *September*, which was prior to the commencement of the term next succeeding the judgment. The court of Common Pleas dismissed the appeal, because it was not entered on the docket within twenty days from the time of the judgment.

The act of 28th *March* 1804 section 4, allows twenty days for appealing after judgment being given, and directs the justice to certify the proceedings before him to the prothonotary of the proper county, "who shall enter the same on "his docket, and the suit shall from thenceforth take grade "with and be subject to the same rules as other actions "where the parties are considered to be in court." In the same section it is directed that the appellant, if defendant, shall give security before the justice in the nature of special bail &c. It is not said that the appeal shall be entered on the prothonotary's docket in twenty days, and therefore it is not necessary. If it is entered before the justice and security given, it is sufficient. It is the business of the justice to certify his proceedings to the prothonotary, and if he fails to do it in twenty days, his default shall not deprive the party of the benefit of his appeal. If the justice delivers his certificate to the appellant to be carried to the prothonotary, and he neglects to carry it in a reasonable time, a different case will

arise, for which a remedy will not be wanting. In *this* case no injury arose by the delay, for the appeal was entered by the prothonotary before the commencement of the term next succeeding the judgment.

But it has been urged by the defendant in error, that a writ of error does not lie in this case, because the proceedings before the justice were not according to the course of the common law. The answer to this objection is plain. Whatever the proceedings before the justice were, yet when the cause came into the court of Common Pleas, it became to all intents and purposes an action at common law, and it is on the judgment of the court of Common Pleas, that the writ of error is brought. In the cases of *Drowne* v. *Stimpson*, 2 *Mass. Rep.* 445., and *Melvin* v. *Bridge*, 3 *Mass. Rep.* 305., where it was adjudged that a writ of error would not lie, the proceedings were under acts of assembly, and differed from the course of the common law; and the judgment was of a special nature, unknown to the common law, and such as the superior court conceived they had no power to give. Those cases therefore are not applicable.

Another objection taken by the defendant in error was, that no final judgment was given by the court of Common Pleas. That point has been decided by this court before. The dismissal of the appeal made an end of the action, and was of the nature of a final judgment. I am of opinion that the judgment of the court of Common Pleas should be reversed.

YEATES J. The principal question in this case is, whether under the hundred dollars act, passed 28th *March* 1804, or its supplement passed 9th *April* 1807, it was necessary that the appeal from a judgment of a justice of the peace on a demand exceeding fifty dollars, should be filed in the office of the prothonotary of the court of Common Pleas of the proper county within twenty days after the judgment given.

In neither of those laws do we find any time designated, wherein the dissatisfied party must file the transcript of the justice's judgment in the prothonotary's office. We must therefore recur to former laws, the decisions under them, and the reason of the thing itself, to form our opinions thereon.

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The old five pound act, as it was commonly called, passed 1st *March* 1745-6, 1 *Dall. St. Laws* 307., gave an appeal in the seventh section, within the space of six days next following the giving of the justice's judgment, but *not after*, to the next court of Common Pleas, upon entering into recognisance &c. The twenty pound act, passed 19th *April* 1794, 3 *Dall. St. Laws* 538., provides in the first section, that in all cases where the debt or demand shall be above five pounds, the parties aggrieved may at any time within the space of three weeks next following the judgment, but *not after*, appeal to the court of Common Pleas &c. The fourth section of the hundred dollars act restricts the appeal to twenty days after the judgment given, and it necessarily refers to former laws giving appeals. In *Plowman* v. *Abrams*, 1 *Dall*, 316., this court decided in *July* term 1788, that after appeal and security given, the justice could not issue an execution against the original defendant, but must proceed against the bail upon the recognisance, though the prothonotary had certified that the appeal was not filed. This determination goes the full length of the case before us, as it considers the appeal made within the limited period, as completed by the entry of the bail.

Here the security has been given within the period limited by law. I see strong grounds for the policy of the law in requiring the party to evidence the sincerity of his intention to appeal, by giving a recognisance with surety within a stipulated time; but I can see no reason for the filing of the transcript within that period. The omission of that act, provided it be done before the first day of the next term, does not prejudice nor delay the adverse party. On this head it is sufficient to say that the act in question does not require it. I am therefore of opinion that the striking off the appeal, because it was not entered in the docket of the court within the twenty days, was unwarranted by law.

But it has been urged that there was no final judgment of the court of Common Pleas, and that a writ of error does not lie. It is certain that the appeal has been struck off in that court, and therefore ultimately decided on. There has been a judgment of dismissal of the appeal, which, while it remains in force, prevents all further proceedings in the suit.

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Even admitting that error only lies where the proceedings are according to the course of the common law, it cannot be denied, that previous to the enlargement of the jurisdiction of justices of the peace, the jurisdiction of the Common Pleas extended to the subject matter of the action, and consequently when it came before that court by appeal, all the rules and principles of the common law must govern its decision.

I am of opinion that the judgment of the court of Common Pleas be reversed, and that the record be remitted to that court for further proceedings therein.

BRACKENRIDGE J. was of the same opinion.

Judgment reversed.

3b 437
5b 533
5b 534
2s 257
2s 260
38 174
38 175

ARMROYD and another *against* The UNION INSURANCE COMPANY.

Philadelphia, Monday, July 22.

Ship and goods belonging to the same owners were insured from *Philadelphia* to *Barbadoes*, but the vessel by stress of weather was compelled to put into *Antigua*, where she was condemned and sold and the voyage broken up. The goods were likewise sold; and the net proceeds of both were paid to the supercargo. The assured abandoned ship and goods, and recovered a verdict for a total loss in each case; but in adjusting the loss, they claimed to deduct out of the net proceeds of the goods which were to be credited to the underwriter, a *pro rata freight* to *Antigua*. *Held* that no freight *pro rata* was due.

Qu. Whether if a *pro rata* freight had been due, it would have belonged to the underwriter on ship by the abandonment, or to the owner of the ship, who had stood his own insurer as to freight.

CASE. "The plaintiffs effected insurance at the office of the defendants on the 28th of *September* 1803, by a policy on the brig *Fair American*, of which they were owners, for 5000 dollars, and a policy on her cargo for 10,900 dollars, on a voyage from *Philadelphia* to *Barbadoes*. There was no insurance on *freight*.

"The brig with her cargo sailed from *Philadelphia* on the 23d *September* 1803, on the voyage insured; but meeting with tempestuous weather, she was forced to bear away for *Antigua*, where upon a survey she was condemned and sold for the benefit of the concerned, and the voyage broken up. The cargo being landed, was sold for the benefit of the concerned, and the proceeds of sale both of vesssel and cargo were paid on the 24th *December* 1803 to the supercargo of the vessel, neither the plaintiffs nor the defendants having any special agent at *Antigua*. The amount of the sales was

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ARMROYD v. UNION INS. COMPANY

afterwards invested in bills, on which a profit arose to the interested, and the bills being remitted to the plaintiffs, they accounted for the principal and profit, to the defendants, on the recovery for a total loss herein after stated, abating a commission of —— per cent. for the negotiation.

"As soon as the plaintiffs heard of the situation of the vessel and cargo at *Antigua*, but before they had heard of the actual condemnation and sale, they determined to abandon and to claim as for a total loss. They accordingly wrote a letter of abandonment to the defendants dated 16th *December* 1803. On the 31st *December* 1803, they exhibited at the office of the defendants copies of the protest and survey, and on the 4th *February* 1804 they exhibited a formal cession with proofs of property. Upon this abandonment, which was never varied nor relinquished, the plaintiffs recovered a total loss on both policies, by a verdict and judgment of the Supreme Court, and the defendants have paid the amount. But the plaintiffs claim also to be paid by the defendants, freight for the goods; and

"The question for the consideration of the court, is whether any and what freight under the circumstances of this case is due from the defendants to the plaintiffs. The papers read on the trial to be used by either party, and the statement in 2 *Binney's Reports*, p. 394., to be taken as part of the case. The decision of the court to settle the rights of the parties."

Gibson and *Tilghman* for the plaintiffs. The plaintiffs, although owners of ship and cargo insured by the defendants, stood their own insurers as to freight. It is the same case therefore as if freight had been insured, and not abandoned. The owner is intitled to a *pro rata* freight earned before he transferred his vessel; and hence in accounting to the underwriters on goods for the proceeds of vessel and cargo, we claim a right to deduct the freight for which these goods were liable. The inquiries then are,

1. Whether the ship owners, under the circumstances of the case, earned a *pro rata* freight; and if so, whether the right to it exists against the underwriters on goods.

2. Whether the freight belongs to the ship owners, or to the underwriters on ship, by virtue of the abandonment.

1. Freight *pro rata* is in all cases due in equity to the ship owner, where a part of the voyage has been performed, and the interruption is not attributable to his fault or misconduct. *Lutwidge* v. *Grey*, (*a*) and *Luke* v. *Lyde*, (*b*) establish the principle, that if a vessel be driven into an intermediate port, and the captain chooses to refit her or hire another, he is intitled to his whole freight; but if he will not refit or hire another, still he is intitled to a *pro rata* freight. The owner if he takes his goods must pay it; and if he will not take them, the captain has a lien upon them for his freight, and may sell them as abandoned by the owner. In *Lutwidge* v. *Grey*, the master was held to be intitled to freight *pro rata* to *Youghall*, where the vessel was shipwrecked, although he refused to carry the goods on to *Glasgow* the port of destination, and they were sent thither in another vessel by the proprietors. In *Luke* v. *Lyde*, lord *Mansfield* says "there "can be no doubt that some freight is due, for the goods "were not *abandoned* by the freighter, but received by him "of the recaptor;" and in the same case, "if the merchant "*does not desire* the master to provide another ship, he is "still intitled to a proportion, *pro rata*." 2 *Burr.* 888. The later cases do in some measure put it upon the ground of an *acceptance* of the goods by the owner; but this acceptance is of no moment intrinsically; for if he will not accept his goods, he must *abandon* them, and if he abandons them, the master has the entire goods, and with them the only security which the marine law gives him for his freight. But take it upon the footing of an acceptance. Certainly there was an acceptance here. The supercargo, whose acts in relation to the cargo are those of the owner, did not desire the master to carry on the goods to *Barbadoes*. He accepted them at *Antigua*, sold them and received the proceeds; and therefore every circumstance exists which intitles the master to a *pro rata* freight. That this title exists as against the underwriter on goods, is very plain, if it exists at all. The acts of the supercargo subsequent to the condemnation at *Antigua*, are for

(*a*) *Abbot on Ship.* 194. (*b*) 2 *Burr.* 882.

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the account of the underwriters by virtue of the abandonment; and they have in fact ratified them by taking the profit on the bills of exchange. His consent binds them. From the moment that freight is earned, the master has a lien upon the goods for its amount, and no transfer of the property to underwriters can remove the incumbrance. We do not claim it of them *quâ* underwriters, but as assignees of the property by abandonment. We still retain the proceeds, and with it our lien, which we have a right to inforce by the deduction claimed.

2. If freight was earned, it belongs to the owner of ship, and not to the underwriter on ship. In the first place there is no equity in giving it to the latter. He did not insure it, and would not have paid for it had it been lost; of course he is not intitled to that part of it which is saved. In the next place, the argument which gives it to the underwriter on ship, proceeds upon the ground that freight is an incident inseparable from the ship; whereas a striking peculiarity of the *English* law of insurance consists in the very separation of ship and freight, which is made for the purposes of insurance. If they are distinct for the purposes of insurance, they must be so for the purpose of abandonment. Again, the argument is fallacious in supposing the freight not be earned until the conclusion of the voyage, before which the underwriter becomes a purchaser by the abandonment; whereas the freight was earned in this case before the abandonment or the loss to which it relates. The loss took place at *Antigua*, because it was the expensiveness of repairs *at that place*, which in connexion with prior disasters, constituted the loss; and the freight *pro rata* was earned before that fact was ascertained. If however the loss was on the 24th *October*, the day of the severest gale, still in equity freight up to that time should be considered as belonging to the owner. So far his funds earned it, in the purchase of provisions, and the hire of seamen, in a much greater proportion than it was earned by the wear and tear of the ship. So it universally is; and therefore in all cases it would be a dictate of the clearest equity to apportion the freight according to the time employed, or the distance performed of the voyage. Any other course would in a great majority of

cases make the underwriter a gainer by the loss of the vessel, and the owner a loser by recurring to his policy on her. The point has been thus settled in *New York*, in *The United Insurance Company* v. *Lenox* (*a*), *Davy* v. *Hallet* (*b*), and *Mumford* v. *Hallet* (*c*); and so in substance it was in *Luke* v. *Lyde*, in which case the owner of the ship sued for and recovered the freight after he had abandoned the ship to the underwriter; whereas by the opposite doctrine the underwriter on ship was alone intitled. The same principle prevailed in *Livingston* v. *The Columbian Insurance Company*. (*d*) In fact while the question was considered with a reference to the fundamental principles of the *English* law of insurance, and to practical consequences, there could be no doubt; it is only by metaphysical arguments, confounding the freight with the ship, and treating it as a mere incident, that a doubt has been raised by late judges in *England*. Their tendency is undoubtedly to bring us to the *French* law upon this subject.

Dallas and *Ingersoll* for the defendants. There can be no action against this company to recover freight, but an action of covenant, for they contract by deed only; but still if the plaintiffs would have a right to recover against any person, and in any form, let them recover.

1. No freight *pro rata* was due when the voyage was broken up. 2. If any was due, it passed by the abandonment to the underwriter on ship, by relation either to the commencement of the voyage, or the time of loss.

The material facts are these. The vessel received her death wound some weeks before her arrival at *Antigua*. She arrived a mere wreck, and all subsequent proceedings were with a view merely to ascertain the effects of the storm, and to furnish evidence of them. In relation to agency, the underwriters had no agent at *Antigua* competent to make a contract for them. No offer was made to carry the goods to *Barbadoes*, nor was the carriage of them thither, dispensed with by the company. The goods were necessarily and in-

(*a*) 1 *Johns. Ca.* 377.
(*b*) 3 *Caines* 16.
(*c*) 1 *Johns.* 433.
(*d*) 3 *Johns.* 55.

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voluntarily landed and sold, before the abandonment was made.

1. We assert the general rule to be, that no freight is due on a contract for the delivery of goods, unless they are delivered at the port of destination, or the owner of the goods refuses to send them on in another vessel, the first being incapacitated. The rule has one and only one exception, where the owner of the goods accepts them at an intermediate port without compulsion; in which case freight *pro rata itineris* is due upon the foundation of a new contract, which the law implies from the acceptance. *Luke* v. *Lyde* was for some time thought to have settled a much broader exception to the general rule; but it is now perfectly understood in *England*, that the *acceptance* of the cargo was the basis of that decision, and that without it, there is no freight *pro rata*. *Mulloy* v. *Backer* (*a*), *Hunter* v. *Prinsep* (*b*), *Liddard* v. *Lopes* (*c*), *Cooke* v. *Jennings* (*d*), *Christy* v. *Row* (*e*). And it must be a voluntary acceptance; for if the goods are received by compulsion, or because there is no alternative but to take them or lose them altogether, there is no freight due. *Hurtin* v. *Union Insurance Company*. (*f*) But granting that there was in the present case an acceptance which would charge the owner with the freight, still the underwriter has nothing to do with it. The owner is liable only in virtue of a new contract, which cannot be transferred to the underwriter. As to *lien*, there is none, for the new contract arises only upon *acceptance* of the goods; and by the delivery to the owner, which must be at the same time with the acceptance, the lien is at an end; or if not by such a delivery, certainly by the delivery to the underwriter or the person acting as his agent. If the consignee of goods sell them before they are landed, he and not the buyer is liable for the freight, though the latter enter them at the customhouse. *Artaza* v. *Smallpiece*. (*g*) If then, in the character of assignee the defendants are not liable, still less are they as underwriters on goods, for they have not insured the freight, nor engaged to indemnify the owner of goods against the payment of it. *Baillie* v. *Modigliani* (*h*), and *Gibson* v. *The Philadelphia Insurance Com-*

(*a*) 5 *East*, 316. (*d*) 7 *D. & E.* 381. (*g*) 1 *Esp.* 23.
(*b*) 10 *East*, 378. (*e*) 1 *Taunton*, 300. (*h*) *Park.* 53. 2 *Marsh.* 728.
(*c*) 10 *East*, 526. (*f*) 1 *Condy's Marsh.* 281.

pany (*a*), are in point. In fact, by such a state of things as justifies an abandonment of goods to the underwriter, all contracts relative to freight are dissolved by the act of God, and the underwriter of course cannot be bound to pay any thing for freight, which arises exclusively from contract. 2 *Emerig.* 194. 196., *Pothier* 113., *The Hiram.* (*b*)

2. The clear inclination of the courts in *England*, is to give the freight to the underwriter on ship. The abandonment relates to the time of loss, which in this case was the gale of the 26th of *October*, or *eo instanti* that the vessel reached *Antigua*. From that moment by relation she was the property of the underwriters. The expenses from that time fall upon them; *Thompson* v. *Rowcroft* (*c*), *Leatham* v. *Terry* (*d*), *Sharp* v. *Gladstone* (*e*), *M'Arthy* v. *Abel* (*f*); and every advantage thereafter accruing from the possession of her, belongs to them alone. At the time of the loss it cannot with any colour of propriety be argued that freight was earned. It was all *inchoate*. It depended upon prosecuting the voyage to *Barbadoes*, or upon acceptance of the cargo at *Antigua;* neither of which could at that time be known. If they had taken place thereafter, it would have been while the ship belonged to the underwriters, and when every thing in relation to freight would concern them and not the former owner. The underwriters had become purchasers prior to any freight being due. They took the vessel with this as an accruing interest; and it cannot be said more than in the case of a ship sold at sea, that the freight is to be divided according to the proportion of the voyage passed at the moment of sale. How is it to be distinguished from an insurance on goods, the profits of which are also or may be insured? If the goods are abandoned, so are the profits. They cannot be retained *in toto*, nor apportioned. The circumstance that freight is distinct for the purpose of insurance, proves nothing. So are profits. The question is, are ship and freight so distinct, that by transferring the ship, freight, which is a recompense for the future as well as the past use of her, will not be transferred also; and there is no authority for such a po-

(*a*) 1 *Binn.* 414. (*c*) 4 *East*, 44. (*e*) 7 *East*, 29.
(*b*) 3 *Rob.* 150. (*d*) 4 *Bos. & Pull.* 479. (*f*) 7 *East*, 388.

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sition. Indeed the equity of the case is with the underwriter. He must go on to earn the freight at his own expense after abandonment, and before abandonment it was in a considerable degree earned by the wear and tear of the vessel, and by disbursements at the outset which are included in her valuation, such as a month's pay to the hands, and part of the provisions. The *New York* decisions have arisen out of a case in which the court was nearly divided, and they have become uniform now, only from deference to this precedent.

TILGHMAN C. J. The plaintiffs claim an allowance for freight, to which they say they are intitled, because it was earned before their abandonment of the ship to the defendants. The goods were to be carried from *Philadelphia* to *Barbadoes*, so that freight would not be due till the delivery at *Barbadoes*. But they never were carried to *Barbadoes;* therefore, upon the original contract, the freight was not earned. It is contended however, that by the marine law, freight is due *pro rata itineris*, although the voyage was but in part performed; and in support of this the case of *Luke* v. *Lyde* is relied on, 2 *Bur.* 883. That case has been so frequently cited, that it has attracted the particular attention of the courts, and it is now understood to have turned on the circumstance of the freighter having *accepted* the goods, at the port to which they were carried after a capture and recapture. So says lord *Ellenborough* in *Liddard* v. *Lopez*, 10 *East* 529., and the reason of the thing proves that he is right. If one contracts to carry my goods from *Philadelphia* to *Barbadoes*, for which I agree to give him a certain price, and he being driven to *Antigua* by stress of weather, offers to carry them on to *Barbadoes*, and I refuse, in that case he is intitled to the *whole* freight, because I am the cause of the contract not being performed. On the other hand, if I ask him to carry them on, and he refuses, in consequence of which the goods are delivered at *Antigua*, he is intitled to no freight, because he has not performed his contract. It would be most unreasonable if he should; for it might happen, that the freight from *Antigua* to *Barbadoes*, (I mention those places only by way of example) would be more than from *Philadelphia* to *Barbadoes*, as was actually

the case in *Luke* v. *Lyde*, where the freight from *Biddeford* to *Lisbon*, is stated as being more than from *Newfoundland* to *Lisbon*. But it may happen, that the freighter may find it his interest to accept the goods at some other port than that of delivery. In that case, it would be just that he should pay freight *pro rata*. But this would be a *new* contract; and if he accepts the goods, without expressly contracting to pay freight, the law will imply a contract. Thus it seems to me, that the law is now settled upon fair and solid ground, for which I refer to the cases of *Cooke* v. *Jennings*, 7 *D.* & *E.* 381., and *Liddard* v. *Lopez*, 10 *East* 526.

In order to raise this implication of a *new* contract, it is necessary that the goods should be accepted by the freighter or his agent *voluntarily;* for if they are in that situation, that the agent or supercargo takes them against his will, and sells them for the benefit of whom it may concern, no freight can be recovered. Such was the case of *Hurtin* v. *The Union Insurance Company*, in the Circuit Court of the *United States* for this district. *Cond. Marsh.* 281. 601. There a ship bound from *New York* to *Gibraltar*, was taken by the *Spaniards* and carried to *Algesiras;* and the *Spanish* government consented, that the captain might depart with the ship and cargo, giving bond not to go to any *British* port in the *Mediterranean*. The supercargo under these circumstances thought it best to sell the cargo, and Judge *Washington* was of opinion that no freight was demandable. In the case now before the court, the plaintiffs were owners of both ship and cargo; and they charge the defendants with freight, as coming to the owner of the ship from the defendants, who have become owners of the goods by virtue of the abandonment to them. This presents a singular aspect, not quite similar to any case that has been cited. It must be decided on the principles which have been mentioned. If the defendants could be considered as having acquired the property and possession of the goods by purchase, after the freight was earned, supposing any to be earned, they could not be chargeable with it unless they had so specially agreed. But the plaintiffs contend, that the defendants must be taken as standing in their place. Consider it how you will, it appears to me that the defendants ought not to be chargeable with freight, because they

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never had an opportunity of making their election to accept the goods at *Antigua*, or have them carried on to *Barbadoes*. The plaintiffs being owners of both ship and cargo, had the ball in their own hands; and without pretending that they ever had the most distant idea of carrying the goods to the port of delivery, or that the defendants had any choice in the business, they demand freight *pro rata*. It is no answer to the defendants' objection, to say, that they have ratified the sale of the goods by accepting the proceeds. What else could they do? If they had refused the proceeds, they might have got nothing. They never were consulted about the sale. In fact the sale had been made before the abandonment. It is too much to say, that the bare receipt of the money under these circumstances should amount to such a recognition of the sale, as would burthen the defendants with freight, to which they would not otherwise have been liable. The goodness or badness of the price for which the goods sold was immaterial. In *Liddard* v. *Lopez*, the freighters refused to accept the goods charged with freight, and it was agreed that they should be sold without prejudice to either party. They produced a handsome profit, and the freighter received the proceeds, but yet it was held that no freight was due. Considering the case before us under all its circumstances, there does not appear to have been any consent of the defendants to accept the goods at *Antigua* either express, or fairly to be implied. I am therefore of opinion, that no freight can be recovered.

YEATES J. The plaintiffs were owners of the brig "*Fair American*" and her cargo, both of which were insured on her voyage from *Philadelphia* to *Barbadoes*. No insurance was made on the freight, and consequently the plaintiffs stood their own insurers as to the freight: but it has been correctly admitted on the argument, that they are intitled to every legal right and benefit, which insurers on freight could possibly claim.

The first question which presents itself, is whether the plaintiffs are intitled to any part of the freight on the goods landed at *Antigua*.

The brig sailed from *Philadelphia* on the 26th *September*

1803, but on the 1st and 6th days of *October* she experienced violent gales of wind, which greatly increased on the 24th, and laid her on her beam ends. The crew to save their lives, found themselves under the necessity of cutting away her main mast and rigging, and discharging her load on deck. The vessel afterwards leaked greatly, and with much difficulty reached the island of *Antigua* on the 11th *November*. The remnant of the cargo was there sold at a good profit by the supercargo for the benefit of the concerned. Neither the plaintiffs nor defendants had any special agent in *Antigua*. The amount of the sales was afterwards invested in bills of exchange, on which a profit arose to the interested; and the bills being remitted to the plaintiffs, they accounted for the principal and profits to the defendants, on the recovery for a total loss, abating a commission for the negotiation.

The defendants do not place their claim to exoneration on the technical ground, that no action would lie against them for this demand, as an incorporated body, except in covenant under their common seal. They judiciously agree, that if a recovery could be had against private individuals in any form of action under the circumstances of the case, they are willing to share the same fate. But they contend that no authority has been or can be shewn, to ascertain that freight in general is payable until the goods are delivered at the destined port, or to fix the liability of the owners of goods to the payment of a ratable freight, unless where they have hindered the owner of the ship, after the occurrence of the event which has frustrated the voyage, from transporting them to the place of destination, or where some new contract has not either been expressly made, or may fairly be inferred from the circumstances of the case, for the apportionment of the freight. *Lutwidge* v. *Gray*, *Abbot* 249. 1*st ed.*, *Luke* v. *Lyde*, 2 *Burr.* 882., and *Christy* v. *Row*, *Taunt.* 300., were decided on these grounds. Indeed in *Cooke* v. *Jennings*, 7 *T. R.* 381., in covenant on a charter party, the freighters were held not to be liable for freight unless the full voyage were performed, or a new contract made, though they received the goods at an intermediate place after the ship was wrecked; and it was said by the court that it was of no moment, whether the contract was under seal or not.

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But in the case before the court, it is said there was no voluntary act of the defendants or of any one in their behalf, accepting the goods at *Antigua*. No option or opportunity of making any choice was offered to them on the occasion. As to the common clause inserted in every policy, whereby the party insured is authorized in case of any loss or misfortune, "to sue, labour, and travel without prejudice to "the insurance," it only means, that until the insured have been informed of what has happened, and have had an opportunity of exercising their own judgment, no act done by the master shall prejudice the right of abandonment of the insured. The loss happens generally at a distance, and they cannot exercise their judgment immediately; it is therefore necessary, that the master who is on the spot, shall do the best he can. *Mitchell* v. *Edie*, 1 *Term Rep.* 613. The supercargo here was the agent of the insured, and intrusted by them; but his acts cannot bind the underwriters. Besides, the captain had a right to retain the goods shipped on board his vessel, till the freight was paid, but when he parted with the possession of them, he could only resort to his contract. *Artaza* v. *Smallpiece*, 1 *Espin. Ca.* 24.

To this it is answered, and in my idea with much correctness, that ratable freight is due under the circumstances of the case, on principles of equity and reason as well as law. It is fully admitted, that in general, freight is not demandable by the ship owner or his captain, unless the goods are transported to their place of destination, according to the tenor of the bills of lading. But the commercial law seems equally well settled, that if the vessel be disabled from completing her voyage, the shipholder may still intitle himself to the whole freight by forwarding the goods by some other means to the place of destination, unless the forwarding them be dispensed with, or unless there be some new bargain on the subject. *Hunter* v. *Prinsep*, 10 *East* 393.

The case of *Cooke* v. *Jennings*, cited by the defendants' counsel, turned on the point of its being an action of covenant founded on the original charter party as an entire contract, and is thus distinguished from *Luke* v. *Lyde*, which was the case of a general assumpsit for the freight of goods, founded on the marine law. The technical objection there

taken, has been expressly waived here. *Lawrence* justice, recognises the law on the subject, and says the subsequent receipt of the goods by the insurer, might be evidence of a new contract between the parties. The question then is reduced to this, have the defendants by the instrumentality of their agents, dispensed with the forwarding the remnant of the goods laden on board, to *Barbadoes?* If they have so done, freight *pro rata* is demandable.

It has been frequently observed, that though the master be the general agent of the shipowners, yet in case of extraordinary calamity, he must also be considered as the agent of the owners of the goods, who have intrusted them to his care, so as to bind them. The same remark is applicable to a supercargo, as between him and the underwriters; and more especially if it shall be established, that the abandonment has a retrospective effect to the period, when the vessel insured received her death wound. But the plaintiffs are under no necessity of relying on this reasoning by analogy. Here was a substitution of money for the goods sold for the benefit of the parties concerned, which was equivalent to an actual restitution of the goods themselves. The accepted substitute inuring for the defendants' benefit afterwards, required no further conveyance, and must be considered as virtually dispensing with the ulterior duty of the shipowners, which would have remained to be performed, if the merchandise had remained in its specific state. The defendants have clearly adopted the acts of the supercargo, as their agent, by receiving the proceeds of sale, and insisting that the profits of the bills of exchange in which the sales were invested belonged to themselves, after deducting a small commission for the negotiation. This brings the case within the principle of the decisions cited. The goods were not *abandoned* by the owners at *Antigua*, according to lord *Mansfield's* expressions in *Luke* v. *Lyde*, 2 *Burr.* 888.; and in *Mackrell* v. *Symond*, *Abb.* 266., he says, "if the ship be cast "away on the coast of *England*, and never arrive at the port "of *London*, yet if the goods are saved, freight shall be paid, "because *the merchant receives advantage from* the voyage: "it is not expressed in the charter party, but arises out of

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"the equity of the case." This doctrine rests on a broad and reasonable basis. See *Scott* v. *Libby et al.*, 2 *Johns.* 341.

Instead of the plaintiffs having parted with their lien on the goods, the real contest now is, what ought to be the extent of the credit allowed to the defendants upon the recovery against them for a total loss on both policies, which is not yet ascertained. The defendants claim the full amount of the proceeds of sale, and the profits on the bills with a small abatement for commission; and the plaintiffs insist that a *pro rata* freight for the merchandise should be deducted. I conclude for the reasons, which have been stated, that the plaintiffs standing their own insurers for the freight, are in that capacity intitled to a ratable proportion thereof.

What that ratable proportion should be, depends on the legal operation of the act of abandonment, whether it relates to the inception of the voyage, the occurrence of the accident, or the time of the cession. The *English* books inform us, that when an abandonment is made, the insurers succeed to all the rights of the insured; but I have not met one decided case in them, which precisely ascertains to what period of time it shall have relation. That the future earnings of a ship insured and abandoned belong solely to the underwriters, there can be no doubt. It would seem that by the *French* law, an abandonment has a retrospective effect from the beginning of the voyage, and that the insurers are supposed to have had the property from that period. 2 *Emerig.* 196. 223. 224. In the Supreme Court of *New York* in *April* term 1800, it was determined, that upon abandonment of the vessel, the owner of the freight being also owner of the vessel, did not thereby abandon his freight *in toto*, but that he retained a certain part to be apportioned *pro rata itineris*, and consequently to be carried down to the time *when the loss happened. United Insurance Company* v. *Lenox*, 1 *Johns. Ca.* 377. This decision was affirmed in the court for correction of errors in 1801, and was afterwards recognised and confirmed by all the judges of the Supreme Court in *May* term 1805, in *Davy* v. *Hallet*, 3 *Caines* 20. I concur therein for the reasons assigned by the judges of that court; and therefore upon the whole matter I am of opinion, that the plaintiffs are intitled to a ratable part of the freight earned on

the 26th *October* 1803, the time when the brig is supposed to have received her death wound in the course of the voyage.

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BRACKENRIDGE J. In the contract of *carrying*, there is an implied undertaking to carry safely to the place of *destination*. The owner taking the goods from the carrier at an intermediate place, may be considered as dispensing with the carrying to the place of *destination*, and as bound to pay for the *carrying performed*, what, taking all things into view, the carrying so far may seem to be *reasonably worth*. This, if not settled by express agreement on the accepting the goods from the carrier short of the place of destination, must in all cases be a matter of *estimation*, for which there is nothing certain to guide in fixing the sum, but which must depend merely on a consideration of what such carrying may be reasonably worth; and this must depend on the taking into view every circumstance of disadvantage under which the goods are accepted. The *pro rata* cannot be the proportion of the distance run to the distance originally destined, throwing out of the calculation the distance of deviation from the direct course from which the ship may have borne away to reach a port. It will not do to say, *as the whole voyage is to the whole freight agreed upon, so this part of the voyage to the part freight*. The disadvantage under which the goods are accepted must be taken into view. Under circumstances, it may be unreasonable that the owner of the goods pay *any freight*, his loss being greater than the *pro rata* freight earned. It may be better for the carrier, or those who represent him, to have the goods taken off their hands, than to be obliged to repair the wreck or procure another vessel. What control in that case has the owner of the goods over the *assurer*, to compel him to repair the vessel, or to procure another? His contract, (the owner of the goods) was with the *original carrier*. Must he not look to him for his remedy? What control has the original carrier, the assured, over the assurer who becomes the carrier, to compel him to repair the vessel, or procure another? What right of action can he have against him if he refuses to repair in a reasonable time, or to procure another vessel? If he cannot have

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the freight earned, as well as that to be earned, it may be a loss to him to go on with the carrying, and in such case he can have no inducement to complete the voyage, which seems the only hold that the assured, after abandonment, can have upon him, to induce him to fulfil the contract of carrying in his stead; and for which contract, he the assured must be answerable *to the owner of the goods*. Admitting that the assured has a right of action against the insurer on an implied undertaking to complete the voyage, is it not better that the interest he may have in completing the voyage should serve instead of legal compulsion, and secure a fulfilment? It would seem to be taken for granted in all cases, that the assurer when he takes the abandoned vessel will go on with the voyage. *This goes to prove the understanding of the parties that it cannot but be his interest to earn the freight;* but it may not in all cases be his interest, unless he is allowed the whole freight, *that earned and to be earned; ergo*, as the logicians would say, *it is the understanding of the parties*, and it is a reasonable understanding, and for the mutual interest of assurer and assured, and is the simplest rule, and the only one easily practicable. In that case he only who lets out his ship to hire for a voyage, or in the language of the merchants, charters it out, *will insure for freight;* in which case, on abandoning the freight, he has the whole to abandon, and the insurer makes good the whole, and takes the *pro rata*, if any has been earned, or the whole if earned, subject to the expenses incurred; which may reduce the freight to very little, *and furnishes a reason why he should have the whole.*

I have said that it is a matter *of difficulty* to settle the *quantum meruit* of a part performed carrying. I would rather say that it is *an absolute impracticability* to reach justice in such a case, from the want of an exact standard of valuation; which uncertainty ought to be avoided, by adopting such a rule as will *reduce* the cases. These cases are reduced, by considering *the assurer as stepping into the place of the assured*, so as to be intitled to the whole freight *from the commencement of the carrying*. In that case the assurer at the time of insurance will look to the being intitled to the whole freight, or hire of carrying, if the ship should at any

time in the course of the voyage be abandoned to him; and he will reduce his demand of premium accordingly. The assured on his part will take the same thing into view; and, the premium being adjusted on this ground, it comes to the same thing as between these, and the only question will be, *which is the simplest and most convenient rule?*

It must lie with the assurer on abandonment, supposing him present, to say, whether he will repair the vessel or provide another, so as to complete the carrying and be intitled to the whole freight, or to take the goods and pay for them, and give up the freight *in toto;* for he has now become the carrier. The carrier in the first instance, the assured, who has abandoned the possession and the property, cannot make himself a party, and dispose of the interest to which another has succeeded. It is for the benefit of the assured himself that the assurer should succeed to an interest in completing the original contract of carrying, by which the assured continues still bound, notwithstanding his abandonment; for it is not in his power by abandoning, to release himself from this obligation to the owner of the goods. It is to him that the owner of the goods must recur on the not completing the carrying. The owner of the goods has no privity of contract with the assurer, and cannot call upon him for his goods nor his damages. It is therefore against the interest of all concerned that the assurer should not succeed to all interest in the freight *pro rata*, and otherwise.

This is the view of the case I have taken as between the assured and the assurer, where only the vehicle of carriage is insured. But where the owner of a ship insures carriage or freight also, not only inconvenience but inconsistencies arise from the principle carried into effect of the assured after abandonment being considered as intitled to the *pro rata of freight earned.* It is this only which he can pretend to abandon to the insurer on freight; for that which may be earned after abandonment goes to the insurer on the ship. It can be only as trustee for the insurer on freight, that the owner of the vessel claims the *pro rata.* What therefore does he get by his insurance on freight when he abandons the vessel? The truth is, that the insurance on vessel and

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on freight at the same time, by the owner of the vessel, is in the nature of it, to a certain extent, *a double insurance.* An insurance of the *absolute* property in the ship, and *the qualified property*, or the use for a specific purpose. *He who insures the part, has already insured the whole.* Should he claim the *pro rata*, he has nothing to abandon. It will become necessary therefore, that in case of such double insurance of ship and freight, the insurer on freight be informed of the insurance on ship also; for in case of an abandonment of ship, the insurer will claim the freight to be earned after abandonment, and the owner of the ship will claim for himself, the freight earned before abandonment. All that he can get in case of technical loss, is the premium paid to him, to be deducted out of the whole freight which he has insured and must pay. The owner of the ship claims the *pro rata for himself*, and not *as trustee* for the insurer on freight. This reasoning goes only to the inconvenience of considering *the owner of the ship* as intitled to the *pro rata*, and not *the insurer on ship.* For not being to have the *pro rata*, having insured the ship, he will not insure the freight without informing that he has insured on ship; and so in case of loss can have nothing to abandon to the insurer on freight, meaning to take the *pro rata* for himself. It goes to shew what must be the understanding also in cases of insurance, since we have nothing of a stipulation for the *pro rata* on freight. It must be considered as going, on abandonment, to *the insurer on the vessel.*

It may not necessarily follow that these deductions must be considered to be the understanding of the parties; but from the language of writers, the insurer on ship would seem to me to be considered *as a purchaser from the time of the insurance.* It is the value of the ship before the voyage that is insured, and not the value at the end of it, or at any intermediate stage. The insurer is considered *as a purchaser conditionally* from the time of the valuation. If she was to be considered as valued as at the time of abandonment, it would be reasonable that the freight she may have earned afterwards, should go with her in lieu of the wear and tear she may have suffered, and which would bring it to the same

thing as a valuation as at the time of insurance. *Emerigon* 196. 222-3-4.

With regard to the second point in this case, whether a *pro rata* has been earned, I would take it from the nature of the contract to carry to a certain place, that, in order to recover *a proportion*, a part only being performed, *the completing the contract must be dispensed with* expressly or impliedly by him *who has an interest in the completing it*. In case of injury to the vessel, it does not lie upon the owner of the cargo to *demand*, but on the owner of the ship *to offer* to repair or procure another. This is not expressly stated that I find in any of the books; for the language is equivocal, one while speaking of the owner of the goods *demanding*, another while of the owner of the ship or his representative the master *offering*, to repair or procure; but I deduce it from the nature of an *undertaking to do a thing*, that it must be done *or offered to be done* to intitle to a compensation. It must be the act of him for whom the thing is undertaken to be done, *to dispense with the doing it* in whole or in part; and by word or act, the duty must be waived by him *who has a right to insist upon it*. He who has undertaken to do a thing in one way, and cannot in that way do it, *must offer to do it in another*.

In the case before us, the supercargo must be considered as representing the owner of the cargo. But it is impossible to say that by accepting the proceeds of the sales, he dispensed with the obligation to complete the voyage; but rather that he accepted as in part of the damages sustained if any, for not completing, and as trustee in this case for the insurer on the cargo. Whether he ought to pay for freight under these circumstances, would seem to depend on his having derived benefit from the carrying so far. It may have been better for him to have had his goods in the port from whence they were carried; or the market may have been not less profitable than that to which bound. This is a fact that a jury would seem alone competent to settle, there being nothing that can with certainty be inferred *as to an offer on one side, or waiver on the other*. If the merchant has been profited, the shipowner ought to be allowed something reasonable. If he has received a benefit the law might presume

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that he has undertaken to compensate. Whatever this might be, I think the insurer on the ship will be intitled to receive. At least I would lay down this principle supposing it a new case. In the *English* books it would not seem to be decided in point; but so far as I can collect, when it comes to be decided, it will be this way. In the *New York* state, the point came expressly to be decided, 1 *Johnson's Cases* 377., where the court were divided, *Radcliff* in my opinion wholly wrong, *Lansing* and *Lewis* half right, *Kent* and *Benson right*. But in the court of errors and appeals what I think right, was thought wrong. It is settled in that state, that as between the assurer and assured this last is intitled to the *pro rata*. My judgment is the reverse, and *that the insurer is intitled;* and this from the *mutual interest and convenience of the parties concerned*, which is always a *test of principle*, and must govern, where a rule would not seem to have been settled expressly to the contrary; and which, from my investigation, would not seem to be the case here.

SNOWDEN and NORTH *against* The PHŒNIX INSURANCE COMPANY.

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Philadelphia, Monday, July 22.

A vessel insured at and from *Philadelphia* to *Amsterdam*, with liberty in case she should be turned off from *Amsterdam*, to proceed to some neighbouring port of discharge, was boarded on her passage by a *British* ship of war, and her papers indorsed with a direction not to proceed to any port at war with *Great Britain*, or which was shut against *British* ships, but to proceed to any port of *Great Britain* or *Ireland* for further directions. She then put into *Falmouth*, where in consequence of head winds, and with a view to obtain convoy, (the captain having there heard of the *Milan* decree,) she remained nearly four months, and then sailed under convoy for the *Downs*, with intent from that place to proceed to *London* or *Amsterdam* according to advice. Shortly before she reached the *Downs*, a gale came on, which forced her into the *Downs*, where she was totally lost. *Held* that the indorsement and warning justified the deviation to *Falmouth;* that the stay at *Falmouth* was justified by the weather, and by the necessity of obtaining convoy; and that even if the *Downs* were out of the course of the voyage to *Amsterdam*, yet the gale justified the captain's going in, and his design before he left *Falmouth* to put in there for advice, was but a mere intention to deviate, which did not affect the policy.

It is not a breach of a warranty of neutrality for the vessel insured to take convoy of a *British* ship of war, if during the voyage insured she has become exposed to the operation of the *French* decrees, in consequence of having been visited at sea by a *British* cruiser.

Upon a demurrer to evidence, every fact which a jury might fairly infer, is to be inferred by the court.

THIS cause came before the court upon a demurrer to the plaintiffs' evidence, which, as far as is material, was as follows:

The defendants on the 31st *October* 1807, underwrote for the plaintiffs a policy for 12,000 dollars, on their ship *Hamlet*, valued at that sum, at and from *Philadelphia* to *Amsterdam*, with liberty in case she should be turned off, to proceed to some neighbouring port of *discharge;* warranted *American* property. The declaration averred that "she never did arrive at *Amsterdam* or such other port of discharge, but was arrested in the course of her voyage by his Britannic majesty's ship *Plover*, and forbid to proceed to *Amsterdam* or any port in *Holland*, but was compelled to go into a port in *Great Britain* or *Ireland*, and on the 4th of *April* 1808, on the coast of *England*, was stranded, sunk, and totally lost by storms, violence of seas &c."

According to the deposition of the captain, the *Hamlet* sailed from *Philadelphia* for *Amsterdam* on the first of *November* 1807, with a cargo of sugar, coffee, pepper, gum, indigo, &c., and on the 10th *December* following, she was boarded by his Britannic majesty's ship *Plover*, *Philip Browne* esq. commander, who indorsed the papers of the *Hamlet* as follows: "H. M. S. *Plover*. At sea 10th *Dec.* '07. "You are hereby directed not to proceed to any port at war

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"with *Great Britain*, namely, *France*, *Spain*, *Holland*, *Den-*
"*mark*, *Italy*, *Liguria*, or any other port that may be shut
"against *British* ships, but proceed to any port of *Great Bri-*
"*tain* or *Ireland* for further directions. *Philip Browne.*"
At this time the *Scilly Islands* bore E. N. E. distant about twenty-four leagues. In consequence of the warning and indorsement, the captain proceeded with the ship to *Falmouth*, that being the nearest and most convenient port, and where he deemed it most for the benefit of all concerned to put in. He arrived off the harbour of *Falmouth* on the 13th of *December*, and wrote for advice to Messrs. *George C. Fox and sons* of that place, one of whom was the *American* consul; and on the same day they returned him an answer, approving of his coming in, and informing him, that in consequence of a late order in council, it would be necessary to come into port before he could proceed to *Holland*. He accordingly went into port, where he was quarantined nine days. At the end of that time he received a letter from *Bainbridges and Brown* of *London*, to whom as the agents of the principal shipper on board Messrs. *Fox and sons* had written for advice, requesting him to take a particular clearance for *Amsterdam*, which had been given by order of government, to relieve him from the blockade in which all the ports of *Holland* were involved. On the 23d *December* he took the clearance, (which set out the warning and indorsement) and prepared to proceed on his voyage; but a gale of wind rendered it impossible, and from this time there was a repetition of bad weather, which kept him in port, until he was informed of "certain decrees of the emperor of *France* and the king "of *Holland*," which exposed him to confiscation if he proceeded to *Amsterdam*. On the 28th *January* he received a letter from *Bainbridges and Brown*, telling of some captures of *American* vessels in the channel by *French* privateers, and advising him to sail with convoy for *Portsmouth*, and from thence to come to *London*, that they might confer personally. The captain left his ship at *Falmouth*, and went to *London*, where he arrived the 1st of *February*, and remained there by the advice of *B. and B.* for three weeks, expecting daily to receive information from *Holland*, which would determine him as to proceeding to *Amsterdam*. On the 20th *February*

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B. and B. delivered him a letter in which, owing to the embarrassments attending the voyage to *Amsterdam*, they advised his proceeding to *Falmouth*, and endeavouring to join the first convoy for the *Downs*, where, upon his arrival, he was to make a signal, and they were to send off their instructions as to further proceedings. The captain arrived at *Falmouth* on the 24th, and not finding convoy he informed *B. and B.* of it, who on the 29th wrote him they had no doubt his *American* insurance covered him to the *Downs*, and advised him if he had no convoy, to proceed immediately with the first fair wind to the *Downs*, where he would find their instructions. The letter proceeded, "we shall then do some "insurance on your ship to *London*, and freight, which can "be done easily." From the receipt of this letter on the 4th of *March* until the 1st of *April*, the wind blew so much ahead that the captain could not sail; but it becoming favourable on the last mentioned day, and the captain having taken a clearance for the *Downs* instead of *Amsterdam*, he sailed under convoy of the *Pickle* schooner, from whom he obtained signals *or* sailing orders. The reason which the captain, in his deposition, assigned for going to the *Downs*, was, that "it would be nearer to his port of original destina- "tion, and where he would have been able to obtain convoy "for the *Texel*, *if* it had appeared prudent to go there; and "from whence he would have been in a better situation to "avail himself of any further orders or directions relative "to his future operations." On the 4th of *April*, it then blowing very hard, the convoying schooner made a signal for the vessels under her protection to put into the *Downs*, which were then in sight, for a harbour, and where they arrived on the same day in a heavy gale from the southwest. During this gale, it became necessary to run the *Hamlet* ashore, to preserve the lives of the crew and the cargo; and although some materials and the chief part of the cargo were saved, yet the hull of the vessel sunk and was lost.

The plaintiffs on the 28th of *May* 1808 informed the defendants that they had received intelligence of this disaster from *London*, and abandoned.

By the deposition of Mr. *John Bainbridge*, of the house of *Bainbridges and Brown*, it appeared that this house had

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not acted as agents for the plaintiffs, but that having insured at *Lloyds* a considerable part of the cargo for Mr. *William Waln*, and consulted with Messrs. *Baring and company* who were correspondents of other shippers, they determined to recommend to the captain to proceed to the *Downs*, "in or- "der that the ship might go either to *Amsterdam*, if from "any information expected to be received, it might be deem- "ed safe, or ultimately to come to *London*;" and in conformity with this, the first letter from their correspondents at *Deal* informing them of the *Hamlet's* arrival in the *Downs*, said of the captain, "he requested us to inform you that he "is waiting your orders, *whether to proceed to London or* "*Holland.*" By the same testimony it appeared, that no *East India* goods, cotton goods excepted, could be landed any where in *England* but in *London.*

The deposition of a captain *Isaac Silliman* was also read in evidence, in which he stated, that at the close of *March* 1808, *American* vessels were very much exposed to *French* capture in going from *Falmouth* toward the *Downs*, and that he had about that time taken a message from *B. and B.* to the captain of the *Hamlet*, requesting him not to sail without convoy.

In the letter of instructions which the plaintiffs addressed to the captain on the 18th of *October* 1807, they did not point out any port of discharge to which he should go, in case he was turned off from *Amsterdam;* but in addition to some general instructions, he was merely told in case of capture or being turned out of his voyage, to make the proper protests.

Upon this evidence the jury assessed damages conditionally for the plaintiffs at 11846 dollars 96 cents.

Hallowell and *Rawle* contended that judgment should be entered for the defendants. They conceded that the party demurring admits the evidence to be true, and also admits every conclusion or inference from the facts which a jury might *fairly* draw. *Baker's case* (*a*), *Stephens* v. *White* (*b*), *Pawling* v. *The United States* (*c*). But they argued that the evidence conclusively established two points, either of which

(*a*) 5 *Rep.* 104. (*b*) 2 *Wash.* 210. (*c*) 4 *Cranch.* 219.

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was fatal to the claim. 1. A deviation. 2. A breach of the warranty of neutrality, by sailing under *British* convoy.

1. Upon being turned off from *Amsterdam*, the *Hamlet* was at liberty to go to a neighbouring port of discharge, and no where else, under the policy. *Falmouth* was not that port, because the cargo was of a kind which could not have been discharged there. It was the duty of the captain to go at once to such a port, upon being warned by the *Plover;* and if his instructions did not provide him with one, we shall see that that does not excuse the deviation. Be this however as it may, the instant he sailed from *Falmouth*, without a fixed ascertained port to which he was to go, he committed a deviation; he was not sailing for any port permitted by the policy. The reason which the captain assigns for going to the *Downs*, is that he might there get convoy to the *Texel*, if it should be thought prudent to go there. The deposition of Mr. *Bainbridge* says the *Downs* were selected that the captain might there receive orders to go to *London or Amsterdam*. The letter from *Deal* to Messrs. *Bainbridges and Brown* before the loss, says, he is waiting your orders to proceed to *Holland or London;* and the captain, though he first took a license for *Amsterdam*, gave it up before sailing, and obtained a clearance for the *Downs*. Every thing therefore was unsettled, until he reached the *Downs*. He did not take it as a port of discharge; it was not the port of his original destination; it was a mere place of deliberation, precisely like *Falmouth*, and which the policy did not permit him to take, because there was no necessity for it. He was already in a situation to receive and to follow any instructions while lying at *Falmouth;* and a little greater convenience in being something nearer to the persons whom he consulted, was not the slightest justification for the change.

A necessity for going into port, out of the course of the voyage, must be made out beyond the possibility of doubt, and that it did arise and exist *without any default of the master or party insuring*. *Woolf* v. *Claggett*. (*a*) The justifications for this kind of deviation usually are to repair the vessel, to escape a storm, or to avoid an enemy. *Park*. 400., 6*th ed*. But there was neither cause here. If the vessel was

(*a*) 3 *Esp*. 257.

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neutral, she had no enemy. The orders in council and the *Milan* decree, were illegal; and under the law of nations, the captain would have been safe in proceeding. The policy would have covered him to *Amsterdam*, notwithstanding the indorsement.

The whole difficulty arose from the omission of the plaintiffs to furnish the captain with proper instructions. Had a port of discharge been pointed out to him, he would not have gone to *Falmouth*, since *London* was the only port of discharge in *England* for the greater part of his cargo. Going to *Falmouth* therefore was not excusable. It sprung from the plaintiffs' neglect; and it was an unpardonable neglect, because by the policy they shew that the event was contemplated.

Going to the *Downs* was equally without excuse; and it was not done by the judgment of the captain, as the best for all concerned, but with a view to obtain instructions from persons who had no control over the ship, and were not the agents of the plaintiffs. In this instance also the instructions were defective. Upon the same principle that a letter of instructions should contain nothing to increase the risk, it should contain such directions as would enable the captain to meet it in a case likely to occur. *Sperry* v. *The Delaware Ins. Company*. (*a*) If it be said that his destination after leaving *Falmouth* was *Holland*, unless he received orders to the contrary at the *Downs*, the answer is, that the *Downs* are out of the course of that voyage. The course from *Falmouth* to *Amsterdam* is on the outside of the *Goodwin* sands, as is clear from the charts in court.

The argument against a deviation allows the assured to have a port at *Falmouth*, another in the *Downs*, and a third either at *Amsterdam*, or *London;* whereas the policy confines the assured to the alternative of *Amsterdam* or a port of discharge, and in that order. If turned off, he was bound to go to a port of discharge, being tied down to the voyage, and the order of the voyage prescribed in the policy. *Beatson* v. *Haworth* (*b*), *Hogg* v. *Horner* (*c*), 2 *Emerig.* 32. The mere turning off, without the alternative clause in the policy, would not have authorized him to go any where else, at the risk of the underwriters. *Parkin* v. *Tunno*. (*d*)

(*a*) 1 *Cond. Marsh.* 473. *note.*
(*b*) 6 *D. & E.* 531.
(*c*) *Park.* 394. *6th ed.*
(*d*) 11 *East*, 22.

2. A warranty of neutral property is an engagement that no act of the assured or his agent shall destroy its neutral quality during the voyage. When he places himself under convoy of one of the belligerents, it must be for the purpose of resisting search by the other, which is unneutral conduct, and exposes the property to condemnation. *The Maria*, (*a*) which was the case of the *Swedish* convoy, contains the most convincing arguments upon this point. It is of no importance that the belligerent against whom convoy was taken, was in the practice of making unjustifiable aggressions upon our commerce. So long as our government chooses to maintain the neutral character, it must acknowledge the belligerent right of search; so long must its citizens permit the exercise of this right, and be bound to the performance of every neutral duty which could be exacted from them in the most regular state of the world. So at least a court of justice must say; and therefore until otherwise directed by law, they must continue to understand the warranty in the policy, in the same sense in which neutrality would be taken during a period of the general prevalence and authority of the law of nations.

If the plaintiffs had not a right to take convoy, this goes also to the point of deviation, as the captain remained at *Falmouth* a long time to obtain it.

Tilghman and *Ingersoll* for the plaintiffs.

1. Upon the point of deviation, the only question by the defendants seems to be, whether sufficient instructions were given to the captain by the assured; but it is wholly overlooked, that the *British* orders of *November* were passed after the *Hamlet* left the *United States*, so that no human foresight could have met the case which happened. Besides, if a neighbouring port had been provided, which undoubtedly meant a port on the continent, yet the warning and indorsement would have intirely defeated such an arrangement. The *Hamlet* was ordered to *Great Britain* or *Ireland* for further directions, and the captain had no alternative, unless he intended rashly to throw away his vessel, but to obey the order. He therefore sought *Falmouth*, not as a port of discharge,

(*a*) 1 *Rob.* 287.

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nor in prosecution of the voyage expressed in the policy, but as the nearest port to obtain information for the benefit of all concerned. No one can say that the necessity of going into that port was not as imminent, as if it had been to avoid an enemy. The cases in *Park*, are but examples; the present case comes within precisely the same rule. He lost no time in recurring to the best advice; but even his advisers, well informed as they were, were embarrassed. They considered his original port as the best, and it is but a fair inference from the evidence, to say that the intention of going there, if possible, was uniformly preserved by the master. If that voyage could not be prosecuted, *London* was undoubtedly contemplated as the alternative port; and so it might be within the policy.

Not a day was lost by unnecessary delay at *Falmouth*, until the *Milan* decree was communicated, and then convoy became essential for the safety of the vessel. Its effect upon the warranty is another point. Captures of *American* vessels were made under this decree, within sight of the very shores of *England*. It was dangerous to proceed from port to port except under the protection of an armed force; and therefore, still following the advice which was given him, captain *Jackson* waited for convoy. If it was lawful to take convoy, the delay for that purpose is excused, because from the evidence it was clearly necessary.

When she left *Falmouth* for the *Downs*, her destination was *Amsterdam*, if the intelligence obtained, and to be forwarded to him thither, should justify it. One of the reasons he assigns for selecting that point, was to get convoy for the *Texel*. He had been at one period so sanguine in the hope of reaching his original port, that he had taken a license for *Amsterdam*, which he afterwards exchanged. The *Downs* were in the course of that voyage. The jury would have inferred it from their geographical knowledge, and also from the letter of *Bainbridges and Brown* that his *American* insurance covered him to the *Downs*, which it would not have done, unless they were in the course to *Amsterdam*.

But putting the case in the strongest manner against the plaintiffs, the evidence shews at most but an intention to deviate. The vessel was still in the course to *Amsterdam*, when

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the gale compelled her to go in. It was of course an involuntary departure, which has no effect upon the contract.

The recent cases in *England*, however, go so far as to decide, that where the port of destination is shut to the assured, and he either goes out of his course, or lies by, with a view of ultimately getting to it, the policy continues in force. *Blackenhagen* v. *The London Assurance Company*. (*a*)

2. It is truly said that the assured engages by the warranty that the neutral character shall not be compromitted by himself or his agent. Against the effect of any order or decree of a foreign nation he does not warrant. In the present case the *Milan* decree stript the *Hamlet* of her *American* character. The first article of it denationalized her, and made her good prize wherever found, in consequence of an event, which the captain could not by possibility have prevented, the visit of a *British* vessel of war. It was the act of *France* herself to destroy the neutrality of this ship. She was declared to be a *British* vessel, a belligerent. No neutral duties were thereafter to be exacted from her; and, of course, taking convoy against the privateers of *France*, was not unneutral conduct, for her neutral character had been previously destroyed. Taking convoy is in ordinary times useless to a neutral. It is under certain circumstances, an offence to a belligerent, and he captures and condemns in consequence of it, because he claims a right to search all neutral vessels. But if this vessel had been captured while under convoy, she would have been condemned not as a neutral resisting search, but as an *American* denationalized by the visit of a *British* cruiser; and it was therefore highly beneficial to the underwriter that convoy should be taken. A theoretical argument may no doubt be raised the other way; but practically, if a neutral is treated like a belligerent by one of the powers of war, our courts will reject the theoretical reasoning, and allow her to use the protection of a belligerent, as being involuntarily in a partial state of war. In *Talbot* v. *Seeman* (*b*) the Supreme Court of the *United States* gave salvage for the recapture of a neutral from the

(*a*) 1 *Campbell* 454. (*b*) 1 *Cranch*. 1.

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French, because in point of fact, an illegal decree of *France* would have condemned her as good prize; yet in such a case by the law of nations the neutral was in no danger. This case ought to be decided upon the same ground.

TILGHMAN C. J. In this case the defendants demurred to the plaintiffs' evidence. The consequence is, that every fact which might have been fairly inferred by the jury, is to be inferred by the court.

The defendants' counsel make two points. 1st, That the underwriters are discharged by a *deviation* from the voyage insured. 2d, That the warranty of *American* property was broken by sailing under convoy.

1. A deviation is a voluntary and unnecessary departure from the course of the voyage insured. Here was certainly a departure, but was it unnecessary? We must consider the case under several points of view. 1. As to the going into *Falmouth*. 2. As to the sailing from *Falmouth* to the *Downs*. 1. There is much to be said in justification of going to *Falmouth*. The danger of proceeding to *Amsterdam* after the indorsement on the papers, was imminent. It matters not whether the *British* orders in council were legal or illegal. I will take it for granted they were illegal, still the danger of proceeding in defiance of them was not the less. The *British* had a force at sea sufficient to carry their orders into effect. What would have been the effect on the policy, had the captain proceeded towards *Amsterdam* after the indorsement of his papers and been captured, is another question. There is enough to shew that the departure from the voyage was not voluntary, but for the purpose of avoiding great danger. It was contended, that inasmuch as the policy provides for the case of being *turned off* from *Amsterdam*, and gives permission in such case, to proceed to some neighbouring port of discharge, the captain had no right to go to *Falmouth*, but should have proceeded immediately to *London*. But the case which happened is not exactly the case provided for; there was not only a *turning off* from *Amsterdam*, but a prohibition to go to any other than a *British* port. This was an event not in the contemplation of the parties, and produced by the *British* orders in council made after the commencement of the voyage. In the unexpected situation, then, in which the

captain was placed, after the indorsement of his papers by the *British* captain, there was nothing improper in his putting into the nearest port, where he might procure good information of the state of public affairs, and regulate his conduct as circumstances should require. I do not say that the policy would not have covered him, if he had proceeded immediately to *London;* but he was not obliged to do so. Objections have been made to the conduct of the captain in remaining so long at *Falmouth.* But if he is to be believed, and the jury would have been justified in believing him, his stay is accounted for by adverse winds, before the *French* decree was heard of, and afterwards by the danger of proceeding without convoy. It is said that the *Downs* are out of the course from *Falmouth* to *Amsterdam.* I doubt whether the proof of that was quite satisfactory; but suppose it to have been so, the captain swears, that the gale came on before he entered the *Downs*, and that the going in was for a harbour, in pursuance of a signal from the convoying ship. If that was the case, there was only an *intended* deviation at most, for the *actual going in* to such a harbour in a storm was not voluntary, and therefore not a deviation. An intention to deviate will not make a policy void.

2. The second point is new, and not without difficulty. Was the warranty broken by sailing under convoy? No case has been cited, which is at all applicable. The case of the *Maria*, the *Swedish* convoy, 1 *Rob.* 287., is very different. There the merchant ships were sailing under convoy, for the express purpose of resisting a search; in other words, of violating a right vested in belligerents by the law of nations. But the present is not simply the case of a neutral sailing under convoy, nor will I give any opinion on such a case, because the convoy which is the subject of our inquiry was resorted to under very particular circumstances. Long after the commencement of the voyage, the captain heard for the first time, of a very extraordinary decree made by the emperor of *France* at *Milan.* By this decree, the *Hamlet* was subject to confiscation, because she had been *visited* by a *British* ship of war. This visitation was an act of force, not of consent; an act which the captain of the *Hamlet* was unable to resist. Yet by the *French* decree, the ship was stript

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of her neutral character, or, as it is said, *denationalized*. It was not the captain then who threw off his neutral character by any voluntary act, it was torn from him by violence. If he had proceeded without convoy and been captured by the *French*, he would have been subject to condemnation. The taking of convoy therefore was in all human probability, for the benefit of all concerned. General rules must give way in cases of extreme necessity. Granting it to be unlawful for a neutral to sail under convoy in general, yet it is not so, when during the voyage, the belligerent against whom convoy is taken, puts the neutral in a state of outlawry without just cause. If the law of nations forbids a neutral to put himself under the protection of a belligerent, the same law affords him protection while he is pursuing his voyage in a peaceable manner, after being *visited* by a belligerent whom he had no power to resist. Indeed I might add that he had no *right* to resist the *visit* and *search* of either of the belligerents, and if he did, he incurred the penalty of confiscation. Here then is a new and singular case. The captain of a neutral vessel having committed no fault, finds himself involved in the penalty of confiscation. In such a dilemma, the common rules of action appear to me to be dispensed with. The neutral is justified in acting so as to meet the emergency of the occasion. The warranty which bound him to conduct himself in all respects as a neutral, is not broken, when compelled by the violence of a belligerent, he seeks refuge from a danger to which as a neutral he ought not to have been exposed. If authority were wanted for what seems sufficiently evident, the case of *Talbot* v. *Seeman*, 1 *Cranch*. 1., justifies me in saying, that in new and extraordinary cases, new principles must be adopted. By the general law of nations, if a neutral is captured by a belligerent and recaptured, no salvage is due, because no service is performed, it being presumed that the courts of the captor would have done justice to the neutral. But salvage is allowed on a recapture, where it is evident that the neutral was not in safety in the hands of the captor, because, if carried into port, the courts would have condemned him. Suppose *France* had declared war against the *United States* after the commencement of the voyage, might not the captain have put himself

under *British* convoy without breach of the warranty? Surely he might, and why? Because, without his consent or default he had been forced out of a state of neutrality before he went under convoy. Now for the purpose of the present argument, I see no difference between a declaration of war and the decree of *Milan*. That decree subjected the neutral ship to condemnation for no fault committed, either by the nation or the individual, and a declaration of war could have done no more. Upon the whole, it appears to me that the act which is complained of as a breach of neutrality, was not resorted to, until the decree of *Milan* had rendered it impossible to support a neutral character. The vessel was proscribed and subjected to confiscation. In that situation the warranty was not broken, by departing from the line of conduct prescribed to neutrals in general, and taking the step which seemed best calculated to avoid the impending danger.

YEATES J. The defence in this suit rests on two grounds. 1. That *John Jackson* captain of the ship *Hamlet* has been guilty of a deviation. 2. That by his conduct the plaintiffs had forfeited their neutral rights.

1. The voyage insured was at and from *Philadelphia* to *Amsterdam*, with liberty in case she should be turned off from *Amsterdam*, to proceed to some neighbouring port of discharge.

The evidence is altogether written; and by the defendants demurring thereto they admit not only the facts stated therein, but also every conclusion which the jury might fairly and reasonably infer therefrom. [His honour then stated the material facts, and proceeded as follows.]

So far am I from concurring with the defendants' counsel, that a deviation appears upon the evidence, that I am fully persuaded there was no intention to deviate from the usual course of the voyage insured. The two great belligerent *European* powers, *Great Britain* and *France*, had made certain naval regulations, unknown to the ancient code of maritime law, and highly injurious to neutrals. The indorsement of the *Hamlet's* papers, that she should not proceed to any port at war with *Great Britain*, or that might be shut against *British* ships, justified her putting into *Falmouth*. The ne-

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cessity on the captain was equally imperious, as if she had been forced thither by storms and tempests. I think the captain acted *bona fide*, with sound discretion, for the benefit of all parties concerned, by going into that port, and determining to prosecute his voyage when it might be done with reasonable safety. If he had attempted to proceed immediately to *Amsterdam*, and had been captured, the underwriters would readily have found out a defence in his obstinacy and temerity. The *Hamlet's* cargo consisted chiefly of *East India* goods, and it appears by the evidence they could only be discharged in the port of *London*. How matters might eventuate between the two conflicting kingdoms was wholly uncertain. The *British* orders in council, or the *French* decrees might receive relaxation. It was prudent to wait for further information, in the actual state of the political horizon. The captain might well meditate *London* as a port of discharge provisionally, in case no rational prospect was opened to him of reaching *Amsterdam;* and the *Downs* was a safe and convenient harbour between the two ports. In fact it appears, that the day succeeding the expiration of the *Hamlet's* quarantine at *Falmouth*, he obtained his clearance for *Amsterdam*. His object was to obtain information of the probable measures of the two adverse nations, and he actually went into that harbour in a strong gale of wind, under a signal from the convoying schooner. I cannot impute blame to him for his conduct. He had never abandoned his original voyage. If a ship with goods on board insured to a foreign port, learns on her voyage that an embargo is there laid on all goods of her nation, and waits at some place as near thereto as she safely can till the embargo is removed, the goods will in the mean time be protected by the policy, while the voyage remains legal. *Blackenhagen* v. *The London Assurance Company*, 1 *Campb.* 454.

2. As to the *Hamlet's* being guilty of a breach of neutrality, by being put under the convoy of the *British* armed schooner at *Falmouth*, I agree that a neutral vessel sailing under convoy of an armed ship of one of the belligerent nations for the purpose of resisting visitation and search, is liable to condemnation by the laws of war. It would in general cases be an adoption of the character of the convoying

nation. To form however a correct idea of this point in the present instance, we must consider the pretensions of *France* in this state of warfare with *Great Britain*. Her decrees profess to confiscate neutral vessels which have been visited on the high seas by *British* cruisers, and thereby directly invade and violate the rights of *America*. The just claims of the *United States* cannot be concluded by such arbitrary ordinances. The captain of the *Hamlet* could not prevent his vessel being visited by the commander of the *Plover*, nor the indorsement of his papers. It cannot reasonably be said that in his passage from *Falmouth* to the *Downs* he should proceed with folded arms, wholly insensible to danger from the *French* picaroon privateers, which infested the *British Channel*, in the prosecution of a voyage strictly legal. The private as well as public duties of captain *Jackson* forbade such a line of conduct, and he was justifiable under existing circumstances in sailing under the protection of convoy. The *Milan* decree of the 17th *December* 1807, puts the *United States* and *France* in a kind of partial war. It is the settled doctrine of the law of nations, that a neutral vessel captured by a belligerent is to be discharged without paying salvage, for being in no danger, she receives no benefit from recapture, and ought not therefore to pay salvage; yet in *Talbot* v. *Seeman*, 1 *Cranch*. 1., salvage was allowed to an *United States'* ship of war, for the recapture of a *Hamburgh* vessel out of the hands of the *French*, though neutral towards each other, on the ground that she was in danger of condemnation under the *French* decree of 18th *January* 1798.

Upon the whole, I am of opinion that captain *Jackson* has not been guilty of a deviation, and that the *Hamlet* did not forfeit her neutral character by sailing under convoy from *Falmouth;* and that judgment be rendered for the plaintiff.

BRACKENRIDGE J. The insurance was at and from *Philadelphia* to *Amsterdam*, with liberty, in case of being turned off from *Amsterdam*, to proceed to some neighbouring port of discharge. The vessel in this case was turned off from *Amsterdam*, but she did not proceed to *a port of discharge*; for it appears from the evidence, that such was the nature

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of the cargo, that it could not be discharged at *Falmouth*, to which port she did proceed on being turned off from *any port shut against British ships*. It is clear therefore that the proceeding to this port was not within the terms of the policy; more especially as it subjected to the delay of quarantine, and for a great length of time, nine days. The harbour of *Falmouth* off the castle of *Pendennis*, might not be out of the direct course of the voyage, and as it did not subject to quarantine to lie off here, it might not be a deviation; but I am clear that the entering the port of *Falmouth*, with the quarantine to which it subjected, was a deviation, and, *other things out of the way*, would discharge the underwriter.

But having entered the port of *Falmouth*, a clearance from it became necessary; and "it is a known and established rule "with respect to a vessel, that if she is navigated under a pass "to a foreign country, she is considered as bearing the charac- "ter of that nation under whose pass she sails. She makes a "part of its navigation, and is in every respect, liable to be "considered as a vessel of that country." 1 *Rob.* 11. The right of search seems to follow from the necessity of ascertaining by search the neutrality of the vessel and cargo, or of any part. A neutral taking convoy obstructs the exercise of this right in a belligerent, and is considered as putting off her neutral character. It is amongst the standing interrogatories to be put to any one examined as a witness in case of capture, "did the ship sail under convoy, and for "what purpose, and to whom did such convoying ship be- "long?" 1 *Rob.* 325. Independent of authority, the act of taking convoy from one belligerent, would seem on every principle of reason to be a forfeiture of neutrality. It cannot be a consideration whether the belligerent, to protect against whom the convoy is taken, has made regulations contrary to the law of nations. The insured must not undertake to judge of that in taking convoy from another belligerent. For admit the right to judge of this in one case, and you must in all. It is deciding upon the illegality, and calling on one belligerent to protect against it, on the invasion of the other. It is in fact allying with one against the other *for defence at least*. For these and other reasons, it would seem to be the

law, that the taking convoy is a forfeiture of the neutral character, and discharges the underwriter. The taking convoy in this case therefore, which appears from the evidence to have been done, other circumstances out of the case, would seem to discharge the underwriter.

But what occasioned the entering the port of *Falmouth*, and the taking convoy?

It was the *preceding visitation of the British* ship *Plover*, *Philip Brown* commander, and the indorsement of the papers of the said ship *Hamlet*, the ship insured. The visitation and indorsement were not a turning away merely from *Amsterdam*, or other port, but an *order to proceed* to any port of *Great Britain* or *Ireland* for further directions. Is it possible to consider the boarding by the *British* ship of war, and the indorsement of the ship's papers, *as less than a capture?* A prize-master was not put on board, nor with the *Milan* decree ahead, was it necessary. The indorsement of the papers carried the vessel as certainly to a port of the *British* empire, as if a prize-master had been put on board. An iron collar put on the neck of a slave, could not more effectually secure against his running away, than this indorsement secured to a *British* port the vessel in question. Whether this capture, as it may be called, was with a view to condemnation, or but to a *qualified appropriation of the property, the securing the trade or duties to themselves*, must be immaterial; for to a certain extent, even in that case, it must be considered *as a taking*. Was not this *arrest*, or *restraint* of the belligerent, a risk within the policy? It would seem to me that it must be considered as a peril insured against, and which intitles to abandon. *It is on this ground, and on this only, that I think the insured intitled to recover.* The legality of the *Milan* decree cannot come into view; it is the actual force only, as in the case of piracy, or a hurricane, that can be considered. It was the visitation of the *British* ship, and the indorsement of the papers that subjected to this; and in fact I am not able to see that the indorsement or marking the property in this manner, did not make it *British*, so as to subject it to a right to abandon.

After this capture or detention by which the voyage may be considered as broken up, the assured would seem by their

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agents, to have laboured in and about the subject of the insurance, with all reasonable judgment, for the use of those concerned; and under the circumstances to have done the best advisable, so as not to devest the right of abandonment which had accrued. It would seem to have been doing the best that under the circumstances of the case could have been done, to enter the port of *Falmouth*, to wait for intelligence, to take convoy and proceed as was done. The loss that happened was not owing to misconduct, but to accident; and not of that nature as to be a departure from the engagement express or implied of doing the best for the interest of those concerned. I am therefore of opinion, that the insured are intitled to recover.

Judgment for plaintiffs.

3c 474
1c 351
32 300

GRATZ *against* PHILLIPS and others, Executors of SIMON.

Philadelphia, Monday, July 22.

Exceptions to the report of auditors in *account render*, are too late after a judgment *nisi* upon the report has become absolute by the expiration of the term in which it was entered. *Qu.* Whether such exceptions ought not to be taken before the auditors, and prior to any report.

AFTER a judgment to account in this case, the court appointed auditors, who on the 28th *November* 1810 filed their report awarding to the plaintiff the sum of 12,169 dollars and 94 cents. The report was read on the first day of *December* term, and a judgment *nisi* entered. On the 13th of *December*, time was granted to the defendants until the 20th, upon Mr. *Dallas's* motion, to file exceptions to the report; but no exceptions were filed until the 7th of *January* 1811, which was after the end of *December* term.

In the first week of the present *March* term, *Dallas* for the defendants moved for a rule upon the plaintiff to plead to the exceptions filed.

Meredith and *Rawle* opposed the rule upon the ground, 1. That the exceptions were too late, as they were not filed until after the expiration of the term to which the report was returned, and after the judgment had become absolute. 2. That they ought to have been taken before the auditors; and as that had not been done in this case, the court could not have received them, if filed at any time.

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Upon the second point, the counsel on both sides went very much into a consideration of the *English* entries and decisions; and the plaintiff's counsel particularly urged, that the point had been already settled by this court in the case of *Moore* v. *Hunter** at *March* term 1807; but it becomes unnecessary to state the argument, as the court declined giving any opinion upon that objection to the rule, being clearly with the plaintiff upon the other.

3b 475
5b 437
5b 439
32 300

* MOORE v. HUNTER. } This was an action of *account render*. Auditors were appointed by the court, and on the 24th *May* 1804, their report was filed in the office, by which a balance of 2486 dollars and 5 cents was found due to the plaintiff. The report was read in open court at *September* term 1804, but no judgment was ever entered on it. On the 8th of *August* 1805 the plaintiff filed a suggestion containing a number of exceptions to the report, and on the 9th of *September* following the court granted the present rule upon the defendant to shew cause why he should not plead to the several matters mentioned in the suggestion.

Todd and *Lewis* for plaintiff.

M'Kean and *Ingersoll* for defendant.

TILGHMAN C. J. delivered the court's opinion.

Two causes have been assigned against the rule. 1. That no exceptions can be received after *four* days from the time the report was read in court. 2. That the exceptions ought to have been taken before the auditors, and cannot be taken after the return of the report.

1. As to the *first* exception, it does not appear that the court have any rule, or any established practice upon the subject. This may be accounted for by the action of account render not being in general use. We do not conceive that the rule with respect to reports of referees is applicable to this case; so that until a rule is established, it is sufficient that the exceptions are filed before judgment.

2. We think the most regular way of proceeding, and by far the most convenient one, would have been to take the exceptions before the auditors, to be returned by them as part of their report. This is the manner of conducting the business, as far as it appears from the *English* precedents cited on the argument. But as this court suffered exceptions to be filed after the return of the report in the case of *Holland* v. *Mackie*, in which no objection was taken on this ground, though other points were controverted, we think it would be unjust to preclude the plaintiff from the benefit of his exceptions in this case. Although in this particular instance the court allow the exceptions for the reason I have assigned, yet it is not to be understood that this practice is adopted. On the contrary, it is expected that in future, the exceptions will be taken at such time and in such manner as is agreeable to the principles and practice to be found in the books, prior to the case of *Holland* v. *Mackie*.

Rule absolute.

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TILGHMAN C. J. This was an action of account render. After the auditors had made their report, judgment *nisi* was entered in the usual manner, and no exceptions were offered till after the expiration of the term. The court are of opinion, that the judgment having become absolute, it was too late to offer the exceptions. On this ground, the motion of the defendants that the plaintiff shall make answer to their exceptions is denied.

On the argument of this case, the counsel on both sides went largely into the question, whether exceptions of this kind ought to be received by the court *at any time*. I forbear to enter into that question at present, as I understand that the same point will come before us, in a case which has been brought up by writ of error from the court of Common Pleas of *Philadelphia* county.

The defendants took nothing by their motion.

JONATHAN CLAYTON *against* JOHN CLAYTON.

Philadelphia, Monday, July 22.

IN ERROR.

The testator devised "unto *S. E.* the granddaughter of his sister, and to her children, the *plantation* they then lived upon, for the use of her the said *S. E.* during her life, and immediately after her decease, to be equally divided among the surviving children of her the said *S. E.*" He gave a legacy of 10*l.* to his heir of *S. E.* took but

IN ejectment in the Common Pleas of *Bucks*, by *John Clayton* the plaintiff below, judgment was entered in his favour upon the following case, which by agreement was brought up by writ of error.

Richard Clayton deceased, being seised in fee of a tract of land containing five hundred acres in the township of *Southampton* in the county of *Bucks*, of which the lands in the declaration are part, on the 15th of *November* 1770 made his last will and testament bearing date the same day and year, and afterwards on the 16th of the same month and year, duly made a codicil thereto, by which will he devised as follows: "I give unto my nephew *Richard Clayton*, the "son of my brother *John Clayton*, ten pounds lawful money "aforesaid. I give unto the children of the said *Richard*

at law, and 40*l.* to each of the children of his heir. *Held* that the children an estate for life.

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" *Clayton* by his wife, each and every one of them, 40*l.* law-
" ful money aforesaid, to be put out to interest by my execu-
" tors for their use until they respectively arrive to the age
" of twenty-one years. *I give and bequeath unto Sarah Evans,*
" *wife of James Evans, and granddaughter of my sister*
" *Margaret Jones, and to her children, the plantation they*
" *now live upon, being the same tract of land I bought of Ja-*
" *cob Jones, containing one hundred and seventy-one acres,*
" *for the use of her the said Sarah Evans during her life, and*
" *immediately after her decease to be equally divided among*
" *the surviving children of her the said Sarah Evans.*"

The codicil contained the following clause. " As for and
" concerning the plantation I have bequeathed unto *Sarah*
" *Evans*, wife of *James Evans*, for the benefit of her the said
" *Sarah Evans* and her children, my will is that the timber
" thereof shall be preserved, and not destroyed by any per-
" son or persons whatsoever, firewood and fencing, being for
" the use of the said plantation, excepted."

The testator died seised in the same month, without cancelling or altering the said will or codicil.

Sarah Evans in the said will named, had at the time of the making thereof, lawful issue five children living, to wit, *Richard*, *Enoch*, *James*, *Sarah*, and *Elizabeth* who afterwards intermarried with *Jonathan Clayton* jun. *the defendant*. After the death of the testator, the said *Sarah Evans* entered and was possessed, and after residing thereon for some years, died in possession during the lifetime of her said five children, who immediately after her death entered and were possessed. Shortly after, to wit in *June* 1789, *Sarah* the daughter of the said *Sarah Evans* died intestate and without issue, and on the 3d of *August* 1793, the four surviving children, to wit *Richard*, *Enoch*, *James*, and *Elizabeth* with her husband *Jonathan Clayton* jun., by deeds mutually executed, made partition among themselves of the said plantation, by which, a tract of twenty-nine acres thirteen perches, was released and confirmed to *Jonathan Clayton* jun. and *Elizabeth* his wife, and the heirs of *Elizabeth*, as her purpart. The lands in the declaration are part of this tract. *Jonathan Clayton* and *Elizabeth* his wife entered and were possessed, and in the month of *May* 1809 *Elizabeth* died leaving lawful issue.

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Richard Clayton the testator died without issue; but in his lifetime he had an only brother *John Clayton*, who died before him, leaving lawful issue *Richard* his son and heir at law, who survived the testator, and was also his heir at law and a legatee in the said will of *ten* pounds. The said *Richard* the second, afterwards in the year 1772, died, leaving lawful issue *John Clayton* his eldest son, *the plaintiff*, *Jane*, *Elizabeth*, *Hannah*, *Rachel*, and *Dorothy*, daughters. On the 18th of *August* 1809, and prior to the commencement of this suit, the plaintiff made an actual entry in the lands in the declaration mentioned, claiming them as heir at law to his great uncle *Richard* the testator; and cut off a small ash tree, and left notice of the entry &c. with the defendant.

The defendant is in possession of the lands in the declaration mentioned.

The question for the opinion of the court, is whether the children of *Sarah Evans* took an estate in fee simple, or only an estate for life. If for life, then judgment to be entered for the plaintiff; if in fee simple, then for the defendant.

Dick for the plaintiff in error, argued in favour of a fee simple, which he said the testator intended to give to the children of *Sarah Evans*, as was obvious from many circumstances in the will. The governing rule in the interpretation of wills is the intention of the testator. He is regarded by the law as *inops consilii;* as wholly unacquainted with technical language; as not at all versed in the artificial limitations of estates; and therefore with infinite propriety it exempts him from the necessity of doing more than plainly expressing his meaning, which if not contrary to the rules of law, it will uniformly execute. Nay, for the purpose of ascertaining this meaning, even where it is not plain upon first view, courts will sift the entire will, and will understand its language, not as lawyers, but as ordinary men. *Wood's Inst.* 299., *Shep. Touch.* 434., 2 *Black. Comm.* 381. *note* 12., *Holmes* v. *Maynill* (*a*), *Strong* v. *Cummin* (*b*), *Brownsword* v. *Edwards* (*c*), *Frogmorton* v. *Holyday* (*d*), *Bridgwater* v. *Bol-*

(*a*) 2 *Show.* 137.
(*b*) 2 *Burr.* 776.
(*c*) 2 *Ves.* 247.
(*d*) 3 *Burr.* 1622.

ton (*a*), *Grayson* v. *Atkinson* (*b*), *Bowes* v. *Blackett* (*c*) *Cowper* v. *Cowper* (*d*), *Ginger* v. *White* (*e*), *Kennon* v. *M'Roberts* (*f*), *Shermer* v. *Shermer's executors* (*g*), *Minnis* v. *Aylett* (*h*), *Roy* v. *Garnett* (*i*), *Lambert* v. *Paine* (*k*). It is the remark of judge *Johnson*, in the last cited case, that the fair presumption generally is, that he who enters upon making a will, intends to make a full distribution of every thing he possesses; and in the present case, where there is no residuary clause, and where the testator has throughout spoken the common language, another presumption is equally fair, that he intended to make a distribution of every thing among the persons he named, and did not expect that any latent interest was to spring up at a distant day for the benefit of any one whom he did not name. At the date of the will, *Richard Clayton* was his heir at law, to whom he gave 10*l.*, and to his children 40*l.* each. Is it not perfectly clear to every mind that he did not intend to give them more? It is true that lord *Mansfield* in *Hogan* v. *Jackson*, (*l*) says this circumstance *alone* will not exclude the heir; but he admits it to have great weight in that case, and coupled with others in this, it ought to be conclusive. Among other circumstances with which it may be connected, is the limitation to *Sarah Evans* for *life*, which is not carried over to the devise to the children. If it is to be generally presumed that a testator intends to give the whole, how much more, when he has first created a life estate out of a plantation to the parent, and upon her death gives it to her children. Ordinary men do not think of creating successive life estates out of the same fee. Another circumstance is the division which he directs to be immediately made among the *surviving* children after the death of their mother. The survivorship, and the division, are both striking features. It is very like *Rose* v. *Hill.* (*m*) The case however which is most directly in point is *Wigfall* v. *Brydon.* (*n*) It was a devise of real estate to *A* for life, and after his death to *B* for life, and after the death of *B* to the children

(*a*) 2 *Salk.* 237.
(*b*) 1 *Wils.* 334.
(*c*) *Cowp.* 238.
(*d*) 2 *P. Wms.* 741.
(*e*) *Willes* 350.
(*f*) 1 *Wash.* 99.
(*g*) 1 *Wash.* 271.
(*h*) 1 *Wash.* 302.
(*i*) 2 *Wash.* 31.
(*k*) 3 *Cranch* 129.
(*l*) *Cowp.* 307.
(*m*) 3 *Burr.* 1881.
(*n*) 3 *Burr.* 1895.

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of the testatrix's cousins *C* and *D*, or such of them as should then be living, share and share alike; and if it should happen that *B* should not be living at the death of *A*, then that the property should *be divided amongst the said children* as aforesaid. Lord *Mansfield* said that the estate was given to *A* expressly for life, and so to *B*. If the testatrix had *meant* the like to the children, she would have *done* the like. Besides, she directed the property to be *divided* amongst seven children, that is, she intended the value to be divided among them, and therefore meant a fee. It is not necessary that there should be either words of limitation annexed to the devise, or even words indicating the quantity of estate, to convey a fee. In *Moone* v. *Heaseman* (*a*) there was neither. The testator gave all his lands in *Cowfold* to his sister for life, and after her decease to her daughter *S.* paying to each of her sisters *E.* and *M.* 500*l.* a piece; and if either of them should die, the survivor was to take the legacy, and if *S.* should die, the testator willed *that the farm should be divided* between the survivors. The court held that *E.* and *M.* were to take a fee in the event mentioned, and *Willes* Chief Justice evidently questioned *Pettywood* v. *Cooke* (*b*) where the contrary had been ruled. *Goodright* v. *Allin* (*c*) confirms *Moone* v. *Heaseman*. The case of *French* v. *M'Ilhenny* (*d*) seems indeed to conclude this case. The peculiar features of that will exist in this, and in this is one which did not exist there, the legacy to the heir at law. Nothing but a technical construction can raise a difficulty; and it is this halting between a strict artificial interpretation of wills, and a liberal understanding of their terms as unlearned men would use and understand them, that the confusion in the construction of wills has arisen. The only way to avoid it, is to adopt and execute the intention, without regard to technical language.

Condy and *T. Ross* for the defendant in error. We admit that the intention must govern, but it must be a plain intention; not such as the private conjectures of a judge may

(*a*) *Willes* 138.
(*b*) *Cro. Eliz.* 52.
(*c*) 2 *W. Black.* 1042.
(*d*) 2 *Binn.* 13.

raise, but such as no enlightened mind can escape from. Whatever the law lays down as a rule of real property, is a just rule; the party holds and gives it according to that rule; and as well may any one part of an artificial system be censured as another, since the whole depends upon policy and convenience, and not upon any principle of justice or morality. Before the statute of wills, lands were not devisable at all, except perhaps in the Saxon times, or by particular custom. They became so generally by positive law. Judicial decisions have established certain rules for the construction of such devises. They may be arbitrary rules, but they are not more so than other parts of the system. They are simple and certain, and it is of importance that when once settled they should never be shaken. Estates are transferred under their authority; family settlements are bottomed upon them; and however in particular cases a violation of these rules may gratify the feelings of an individual, yet it lets in such a flood of uncertainty, that no one can tell what is the construction of a will without resorting to a court, and even different courts may as well disagree, as different individuals. There is no safety but in an adherence to judicial precedent, until the legislature, not the court, shall think fit to destroy its authority. Two of these rules have been acquiesced in for a century and a half. The one is, that where real property is devised without limitation, it is but an estate for life, unless from other parts of the will, an intention to give a greater estate is plainly to be inferred. The other is, that the heir at law is not to be disinherited without express words, or necessary implication. Conjecture, ambiguity, uncertainty, shall never disinherit him. *Hayford* v. *Benlows* (*a*), *Harwood* v. *Goodright* (*b*), *Frogmorton* v. *Wright* (*c*), *Bowes* v. *Blackett* (*d*). In the present case the devise to the children of *Sarah Evans* is without limitation; and every argument in support of a fee, is not only conjecture, but it is conjecture in direct opposition to judicial precedent. The direction that the estate should be divided among the children is no-

(*a*) *Ambl.* 583.
(*b*) *Cowp.* 92.
(*c*) 3 *Wils.* 418.
(*d*) *Cowp.* 235.

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thing. In *Dickins* v. *Marshal* (*a*) the devise was of all the testator's lands and goods to *R.* and *M.* his children, *equally to be divided* between them; and it was held to be an estate for life. In *Peiton* v. *Banks* (*b*) the testator devised lands to his wife for life, and the reversion to *A* and *B* to be equally divided betwixt them; and yet *A* and *B* took but for life. Here was both the express estate for life, and the division, but without any influence. In *Woodward* v. *Glassbrook* (*c*), one devised several parcels of land to his several children in tail, and if any of them should die before twenty-one or unmarried, his part to go to the survivors; yet the survivors took only a life estate in that part. *Middleton* v. *Swain* (*d*) is a strong case to the point, that although you may see enough on the will to make you think it probable that a fee was intended, yet *probability* will not do; it must be a plain case. As to the pecuniary legacy to the heir at law, the point occurred in *Roe* v. *Bolton* (*e*) where it was not allowed the least weight. The authority of *Pettiwood* v. *Cook* has never been judicially shaken; it is supported by many later cases. The only decision which countenances the argument for a fee is *Wigfall* v. *Brydon*. But this case cannot be law; and if it be, it has been so explained as to be a very different case from the present. In *Burrow's* report of the case, lord *Mansfield* puts the decision upon the estate's being small, a wasting estate, and not fit for division, which are not very good reasons. However be they good or bad, they do not apply here, where the estate is large and has been divided. In *Wigfall* v. *Brydon* it was a house and barn. The true ground of that case was that the devise amounted to a power to *sell* and divide. So it appears from *Goodright* v. *Patch*. [Here the counsel read a manuscript note of that case taken by Mr. *Edward Tilghman* in the King's Bench in *June* 1773.] *French* v. *M'Ilhenny* was a very different case. The will contained introductory words shewing an intention to dispose of every thing, and the devise in question was of all the plantation not before given to the wife, which was a life estate. The codicil to the present will negatives a fee, as it prohibits the devisees from

(*a*) *Cro. Eliz.* 330.
(*b*) 1 *Vern.* 65.
(*c*) 2 *Vern.* 388.
(*d*) *Skinner* 339.
(*e*) 2 *W. Black.* 1045

cutting timber, which the testator would not have done, had he intended an absolute estate of inheritance.

TILGHMAN C. J. *Richard Clayton* deceased, by his last will and testament dated 15th *November* 1770 devised as follows. "I give and bequeath unto *Sarah Evans* wife of *James* "*Evans*, and granddaughter of my sister *Margaret Jones*, "and to her children, the plantation they now live upon, be- "ing the same tract of land I bought of *Jacob Jones*, con- "taining one hundred and seventy-one acres, for the use of "her the said *Sarah Evans* during her life, and immediately "after her decease to be equally divided among the survi- "ving children of her the said *Sarah Evans*." A legacy of 10*l.* was given to the testator's nephew *Richard Clayton*, who was his *heir*, and 40*l.* a piece to each of his children. In a codicil dated the day after the will, there is the following clause. "And as for and concerning the plantation I have "bequeathed to *Sarah Evans* wife of *James Evans*, for the "benefit of her the said *Sarah Evans* and her children, my "will is that the timber thereof shall be preserved, and not "destroyed by any person or persons whatever, firewood and "fencing, being for the use of the said plantation, excepted." Did the children of *Sarah Evans* take an estate for life or in fee simple? That is the point for our decision.

That the intention of the testator shall be carried into effect, if not contrary to law, even though such intention shall not be expressed in the usual form, is a principle not to be controverted; but such intention must appear by the *words of the will*, and not by *conjecture*. It is also a settled principle, that a devise of land to a person in general terms, without words of limitation, or any other words shewing an intent to give more than an estate for life, shall pass no more than an estate for life, unless it can be fairly inferred from other parts of the will, that more than an estate for life is intended. For instance, if the devisee is ordered to pay a sum of money to another person, it may be fairly inferred that a fee simple was intended, because otherwise the devise might turn out to be an injury rather than a benefit. It has been often said, that it may be reasonably supposed the testator intends a fee simple in every case, in which there are no expressions to the contrary; that

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when a man gives a thing, he means to give the whole property. But although this has been said, it has always been added, that whatever *conjecture* the judge might form as to the intention, yet he is bound by the principle which in such cases has confined the estate to the life of the devisee. When a principle of construction has been fixed, it becomes a rule of property, and cannot be unfixed without violating the rights of property. Purchases are made under the advice of counsel, and the opinions of counsel are formed on the decisions of the courts. When the legislature think proper to make alterations in the law, they take care to confine them to *future cases;* but fluctuating decisions of courts of justice, have a mischievous *ex post facto* operation. These considerations have satisfied me, that I am not at liberty to indulge myself in *conjecture*, concerning the intention of the testator. The estate is not to be taken from the heir, without an express devise, or words from which a clear implication may be drawn. Let us apply these principles to the will in question. An express estate for life is given to *Sarah Evans*, and immediately after her death the estate is to be *equally divided* among her children. Here is a devise in general terms to the children. What ground is there for implying a larger estate? It may be said, that inasmuch as their estate is not to commence till after their mother's death, it may be supposed that they were to take the fee, because otherwise they might derive but little benefit. This remark would have little weight, if it was now made for the *first* time. But after the numerous decisions, in which devises to commence in possession after the expiration of a life, have been held to convey no more than a life estate, it has no weight at all. Another circumstance relied on by the counsel for the plaintiff in error, is, that the estate is to be *divided* among the children. If the estate had been ordered to be *sold*, and the *money* divided, the absolute property would have passed to the devisees. But it is the *land* which is to be divided. The convenience with which the land may be divided, depends upon the quantity of the land, and the nature and value of the improvements, but by no means upon the quantity of estate given to the devisees. In support of the argument drawn from the estate's being ordered to be *divided*, *Oates ex dem.*

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Wigfall v. *Brydon* was cited, 3 *Burr.* 1895. Lord *Mansfield* in giving the opinion of the court in that case, says, "The "testator gives to the seven children after the two lives, a "*wasting* property, share and share alike. Besides, she di- "rects the house and stable to be divided amongst the seven "children, that is, they must be *sold and the produce divided.*" If the will in that case directed the estate to be sold and the produce divided, no doubt the whole interest passed; or if the estate was of such a nature, that it could not be divided into seven parts, there would be some reason for saying that the testator knew it must be sold, and must have so intended. But if that was not the case, it will be difficult to reconcile this opinion of lord *Mansfield* with other decisions of good authority. In *Peiton* v. *Banks*, 1 *Vern.* 65., there was a devise to the wife for life, with remainder to *A* and *B* to be equally divided. It was held that *A* and *B* took but an estate for life. In the manuscript note of the case of *Goodright* v. *Patch*, decided in the King's Bench 20th *June* 1773, and shewn to the court by Mr. *Edward Tilghman*, it is said that the case of *Wigfall* v. *Brydon* turned on the *selling and dividing*. And in *Denn ex dem. Gaskin* v. *Gaskin*, lord *Mansfield* speaking of *Wigfall* v. *Brydon* says, "the ground the court "went upon, was, that from the nature of the estate, and the "words used by the testator, they amounted in fact to a "direction to sell the estate, and divide the produce of it." *Cowp.* 659. Whether the court were warranted in putting that construction on the will, it is unnecessary now to inquire, because in the case before us, there is no ground for an argument of this kind. There is no difficulty about dividing, for the land has been actually divided; nor is there the most distant intimation of a desire, that the estate should be sold. *French* v. *M'Ilhenny*, 2 *Binn.* 13., decided in this court, was also cited. In that case the court were divided. A majority were of opinion, that taking the whole will together, they could discover an intent to give an estate in fee; but I did not understand that any change was intended to be made in the established principles of construction. Suffice it to say, that the expressions on which the court relied *there*, are not to be found in the will of *Richard Clayton*.

The last and strongest argument in favour of a fee simple, is

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drawn from the devise of 10*l.* to the heir at law. This circumstance is worthy of consideration. It affords some ground for supposing, that as 10*l.* was given, it was intended that the heir should have *no more*. But a doubtful intention is not sufficient. The rule of law gives the estate to the heir, unless the will takes it from him; and in order to take it from him, it must give it to some other person. Thus we are brought back to the question, are there any words in this will, sufficient to convey more than an estate for life to the devisees? I can find none. If the testator had expressly said, that the heir at law should have 10*l.* and *no more*, I should have thought his intention on the whole sufficiently clear, to give a fee to the children of *Sarah Evans*. But the implication arising from a small devise to the heir, without negative words added, has been expressly decided to be insufficient. In *Wright on the demise of Shaw* v. *Russel*, decided in the exchequer in 1701, and cited by justice *Wright* in *Gaskin* v. *Gaskin*, *Cowper* 661., there was a devise of 1*s.* to the *husband* of the heir, and yet the heir was held not to be disinherited. And in subsequent cases, the same principle has been adopted, when there were devises of a small sum to the *heir himself*. In such cases there is plausible ground for *conjecture*, that it was intended to *disinherit* the heir, because we know, it is a common notion, that it is necessary to give a shilling to the heir in order to *cut him off*. This notion is derived from the Roman law, by which a testament was said to be *inofficious*, if no mention was made of the heir. The decisions in these cases, all tend strongly to confirm the principle, that the heir takes every thing which is not given away by express words or clear implication. The will of *Richard Clayton* containing no such words, nor any ground for clear implication, I am of opinion that the children of *Sarah Evans* took no more than an estate for life.

The codicil is to be considered in conjunction with the will. I do not think the *direction* about the timber very material; but if it has any operation, it is against a fee simple, because a direction that a devisee in fee should not cut timber, would be inconsistent with the nature of the estate, and therefore void. My reason for not thinking it very material, is, that it is not clearly expressed to whom this direction is addressed, whether to *Sarah Evans* or her children.

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YEATES J. The question before the court rests on the true construction of the last will of *Richard Clayton* deceased, dated 15th *November* 1770, and the codicil thereto dated the day following. The material clauses are as follow. "I give "and bequeath unto *Sarah Evans*, wife of *James Evans*, and "granddaughter of my sister *Margaret Jones*, and to her "children, the plantation they now live upon, being the same "tract of land I bought of *Jacob Jones*, containing one hun- "dred and seventy-one acres, for the use of her the said *Sa-* "*rah Evans during her life*, and immediately after her de- "cease *to be equally divided among the surviving children* of "the said *Sarah Evans*." In the codicil it is said, "And as "for and concerning the plantation I have bequeathed unto "*Sarah Evans*, wife of *James Evans*, for the benefit of her "the said *Sarah Evans* and her children, my will is, that the "timber thereof shall be preserved, and not destroyed by "any person or persons whatsoever, firewood and fencing, "being for the use of the said plantation, excepted." There are no introductory words shewing the intention of the testator to dispose of his *estate*, either by the will or codicil; nor are there any residuary devisees appointed by either instrument. The privileges out of the real estate devised to the widow, are confined to her state of widowhood. *Sarah Evans* the devisee died in the possession of the premises, leaving five children, one of whom has died intestate. The four surviving children have made partition, and twenty-nine acres and thirteen perches have been assigned to *Elizabeth*, who intermarried with the plaintiff in error, as her full purpart and share of the lands devised as aforesaid. She is also dead, and the suit is brought to recover the possession of the twenty-nine acres and thirteen perches, by *John Clayton*, who has proved himself to be the heir at law of the testator. The question to be decided, is, whether the children of *Sarah Evans* named in the will, took an estate in fee simple in the said plantation, or only an estate for life.

On the part of the plaintiff in error, it has been strongly contended, that the intention of a testator as disclosed in his will, according to the plain meaning of his words in their common sense and understanding, is the paramount rule of construction; and that where the devise is conformable to

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law, no technical expressions whatever are necessary to effectuate his intent. All artificial rules are disclaimed; and it is confidently asserted, that the compound construction of the *common acceptation of terms and the technical meaning*, has been the cause of uncertainty in the exposition of testaments. When a testator makes his will, it must be presumed that he means to dispose of all his temporal property; and this is strengthened by the circumstance of his not devising the residue. Introductory words in a will are the mere creatures of the scrivener, who draws it; and nothing can be inferred from the want of them. No man of plain common sense on reading this will could hesitate in pronouncing, that when the testator gave the plantation to *Sarah Evans* during her life, and after her death to be legally divided amongst her surviving children, his meaning was, that those children should take after their mother's death, their several proportions thereof, absolutely and in fee simple; and this construction is fortified by a devise of 10*l.* to *Richard Clayton* his nephew and heir at law at the time of his death, and to each of his children 40*l.*

The defendant's counsel fully admit, that the intention of the testator is the governing principle in the construction of wills; and that there is no magic in any particular form of words, whereby his meaning may be effectuated; though it is indispensably necessary that his intention should be clear and manifest, from the expressions he has made use of. Independently of human laws, there is no natural right of succession to lands. The statutes of 32 *Henry* 8. *c.* 1. and of 34 and 35 *Henry* 8. *c.* 5. in *England*, gave the general power of aliening lands by will. It is agreed, that great indulgence is given in the construction of wills, the law considering the party *in extremis et inops consilii*. Though no words of limitation are added to a devise of lands, yet if there are expressions of equal import, as the words *forever*, *my estate*, *paying such a sum of money*, &c. the law will enlarge the gift accordingly. But the settled rule is, that the heir at law is the favourite of the law and of equity; and is not to be disinherited without express words or necessary implication. *Ambl.* 583. If the intention of the testator be doubtful, whether the devisee shall take in fee or not, the rule shall take

place. *Cowp.* 92. 355., 3 *Wils.* 418. Without words of inheritance, an estate for life only passes. *Cro. El.* 330.

By discarding settled rules of construction, and adjudged cases on wills, a judicial tyranny will be established, and this branch of the law be thrown into confusion and uncertainty. No counsel can advise his client; under a controverted will no man can purchase with safety.

Many cases occur in the books, where there is a devise to one for life, the reversion over to others equally to be divided between them, and the latter have been held to take an estate for life only. *Peiton* v. *Banks*, 1 *Vern.* 65., *Bowes* v. *Blackett*, *Cowp.* 235. The words "*share and share alike*" are held to be tantamount to "*equally divided between them*"; and the word "*share*" was held to express the thing devised, and not the quantity of the estate. *Middleton* v. *Swain*, *Skin.* 339., which was affirmed in parliament. *Show. Parl. Ca.* 207. One devised several parcels of land to his several children in tail, and if any of them should die before twenty-one or unmarried, such child's part to go to the surviving children; adjudged, that the survivors should have such share for life only. *Woodward* v. *Glassbrook*, 2 *Vern.* 388. Devise of all my lands and goods after debts and legacies paid, to *A* and *B* my children equally to be divided between them; held that an estate for life only passed to them in joint-tenancy. *Dickens* v. *Marshal*, *Cro. El.* 330. As to the legacy of 10*l.* devised by the present will to the heir at law, the court of Common Pleas were clearly of opinion that a small pecuniary legacy to the heir is not sufficient to exempt a case from the general rule of law, which declares that a gift to a man of lands, without expressing for what estate, vests only an estate for life. *Roe ex dem. Callow et al.* v. *Bolton*, 2 *Black. Rep.* 1045.

The remark, that general introductory words, evincing a disposition to dispose of all the temporal estate, are the mere acts of the scrivener, either proves too much or nothing whatever. Assuredly the will is drawn by him; but if he does not with correctness reduce to writing the intent of the deceased, or uses unapt and improper words, whose legal operation is opposed to the will of the testator, what human tribunal governed by known and fixed rules of decision, can apply the remedy?

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When it is asserted, that the plain meaning of the will was to give an estate in fee simple to the children of *Sarah Evans* in the lands in question, it is presupposed that the rules of granting realty and personalty are precisely the same, and that lands would pass with as little ceremony as a horse or a cow. This certainly would prostrate all judicial decisions. At best however it is but guess and conjecture. Whoever drew the will, had some faint idea of words of limitation. When devising the negroes to the widow, he superadded the words "*and to her heirs and assigns;*" and in devising certain lands to *Jonathan Clayton*, he annexes the payment of a gross sum, which would clearly give a fee, the same being inconsistent with a life estate in the premises. To this may be subjoined the observation, that the restrictions imposed in the codicil, as to the preservation of the timber on the plantation devised to *Sarah Evans* and her children, are totally incompatible with the latter taking a fee simple interest therein. Admitting however the meaning of the testator herein to be problematical, the rule of law is decisive against the pretensions of the plaintiff in error.

I feel no difficulty whatever in the decision of the present case, either on principle or precedent. An act of the legislature (passed on the 28th *January* 1777) has declared, that the common law and such of the statute laws of *England*, as had theretofore been in force, except as is thereafter excepted, shall be in force and binding on the inhabitants of this state. The rule relied on by the plaintiff is frequently asserted, in the English books, which are evidence of the common law. This court, and I think I may safely add, every other court of justice in the government both before and since the American revolution, have adopted it. In *Busby* v. *Busby*, 1 *Dall.* 226., we find these expressions of *Shippen* president of the Common Pleas. "The intention of the testator is said "to be the pole star, to guide the construction of wills. But "there are two qualifications to this rule. 1st, That this in- "tention must not clash with the rules of law, and 2d, that "where legal technical terms are wanting, the intention to "supply them must be clear and manifest from the words "and expressions in the will." I cannot see on what grounds the judiciary would be authorized to change the strong uni-

form current of decision, unless by the aid of the legislative branch.

But independently of the act of 1777, could we either with propriety or convenience to the public peace and safety, change the system of law on this subject? As to myself, I find the decisions of our own courts an insuperable obstacle in my way; and I frankly declare, that I am not prepared to go the whole length of declaring independence of the decisions of the English courts, previous to the 4th *July* 1776, subjecting the construction of a will to technical rules. My habits, grown rigid during the period of half a century of my life, imperiously interdict the measure. I have been taught to consider those judicial determinations as a system of refined wisdom matured by experience, which it would be highly dangerous now to unsettle. I view them as establishing the landmarks of property, which it would be unjust now to vary or remove. In a particular instance my individual wishes may lead me to desire, that the devise was couched in different terms, in order to accomplish my ideas of the supposed intent of the testator. I will construe a will, and imply an intention not expressed therein in words particularly; but I will not from arbitrary conjecture, though founded on the highest degree of probability, add to a will or supply the omissions. I go as far as I can, when I repeat the language of an English judge. "I will depart from the techni-" cal sense of words, to effectuate the intention of a testator, " as far as possible without violating the rules of law." In matters of positive right, I must submit to and follow those ancient and invariable maxims, *quæ relicta sunt et tradita.* *3 Bl. Com.* 436. It is of not so much moment what the law is, as that it should be known and settled. When this takes place, every citizen is bound to conform to it; and when a case of seeming hardship occurs, wherein I may think the will of a testator has been disappointed, I console myself with the reflection, *sic voluit sed non dixit.* It is most congenial to the spirit of a government of laws, that known rules should determine the conduct of their tribunals of justice, and the steps of their judges be measured. The observation applies with peculiar force to the case of wills, wherein different and contradictory intents often appear on the face of

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the same instrument, wherein the meaning is not conveyed with any degree of precision, and the different events which might take place have not been contemplated. In such instances, with all the assistance we can derive from our books, we are thrown under the greatest embarrassments; but without it, shall we not according to the ludicrous idea of Mr. *Selden* (untruly applied to a court of equity,) make the measure of the judge's foot, the rule of decision? In my view of the case, the utmost uncertainty and confusion must necessarily be introduced by this rage of innovation.

The established rule is thus laid down by lord *Mansfield* in *Loveanes on the demise of Mudge* v. *Blight et ux.*, *Cowp.* 355. "Where there are no words of limitation, the court "must determine in the case of a devise affecting real estate, "that the devisee has only an estate for life; because the "principle is fully settled and established, and no conjecture "of a private imagination can shake a rule of law. If the "intention of the testator is *doubtful*, the rule of law must "take place; and so if the court cannot find words in the "will sufficient to carry a fee. Though they should themselves be satisfied beyond the possibility of a doubt, as to "what the intention of the party was, they must adhere to "the rule of law."

The observations of the defendant's counsel abundantly satisfy my mind, that the intention of the testator to grant a fee simple to the children of *Sarah Evans* in the lands in question, was at least doubtful; and the authorities they have cited fully confirm this remark. See also *Moone lessee of Fagge* v. *Heaseman. Willes* 141.

I am therefore of opinion that judgment should be entered for the defendant in error.

BRACKENRIDGE J. The language of this will is not that of a *learned* or *half learned* person, but evidently of the testator's own writing, without a single word through the whole that savours of an affectation of *scientific terms;* for I consider the words "heirs and assigns" annexed to the gift of the "*negro boy*" devised to the wife, as slipping in of course, from having used it, or seen it used in a bond or promissory note, where being unnecessary, we have it with-

out any meaning, now that a note is assignable by act of assembly, and the interest in the nature of it goes to the executor, and not to the heir in the technical sense of the word. It would have saved this trouble, if these words had been annexed to the devise of *the real estate;* and perhaps it would be no great strength of construction, if we were to carry them forward in our minds, and make use of them when *first wanted.* This is thought to be, when we come to the devise of the "*plantation to the wife of James Evans,* "*and grand daughter of his sister Margaret Jones, and to* "*her children.*" But as this might be considered a stretch beyond the indulgence shewn to wills, I shall not insist upon it; though at the same time, if the testator thought of the use of these terms "heirs and assigns" at all, I have no manner of doubt, but that he thought that having put them in the writing *once* at the beginning, they would serve *to season it through the whole*, and qualify every bequest that was subsequently made. But I flatter myself we shall be able to do without them, and be justifiable in inferring *a devise in fee simple* from the terms that are used. I shall take notice nevertheless of the other devises, "*to his nephew Richard* "*Clayton* the son of his brother *John Clayton* 10*l.*; to the "children of the said *Richard Clayton*, each and every one "of them, forty pounds; to his nephew *Jonathan Clayton*, the "son of his brother *John*, *his mansion house*, *with the land* "*thereunto belonging.*" Here are no words of inheritance, more than in the case of other devises of personal property; and yet I cannot doubt but that he meant his nephew should have the *mansion house and land*, out and out. It has not been questioned under this will but that he does so hold it. The plaintiff is the *descendant of the nephew Richard*, to whom the devise of ten pounds was made; and to whose children, a farther devise of forty pounds each, which may fairly be considered as all that was intended that stock; yet *it is one of these* that now claims the estate in question against another devisee.

But to come to the terms that are used in the devise under which the defendant claims. These are found in the will, and in the codicil. But before we undertake to consider these, let there be premised an observation on *the*

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history of the construction of wills. The power to devise being *given by statute*, it came to the courts to construe wills *as other writings;* and why introduce a distinction in the construction of these, and other writings? What distinction? Why that *the intention* shall govern, but that the same words which would *be evidence of intention* in the case of a chattel, shall not evince in a case of real estate. Yet they did not require the technical terms of a deed, but indulged the lay people, who might be supposed to write their own wills, to a certain extent. And why not to the whole extent of the popular language? *Licentia sumpta pudenter*, it may be said; and that it would be too great a stretch at once to go so far. It would have been equally justifiable however, and certainly more for the quiet of possessions. The rule ought to have been, *that unless something appears in the will from which a less estate than a fee simple is given, the devise shall carry a fee.* The rule is otherwise; viz. that something must appear, more than the mere giving the property, from whence it may be inferred that a fee simple was intended. The mere naked words, *I give the land*, as in the case of a personal chattel, will not suffice. It is true the decisions have brought this to a very slight matter. Introductory words declaring an intention to dispose of the *whole worldly estate, to settle temporal affairs, &c. Estate* and even *effects* have been considered *ex vi termini* as carrying a fee. The word *settle*, certainly has. That I may not be thought to speak without book, I cite the case. *Barnard. Chancery Rep.* 14. 8 *Viner* 230. I meant to have said, cite the books which refer to the case. "What "I have, I intend to *settle* in this manner." By the word *settle* says the lord chancellor, the testator shews his intention to make a *settlement* of the whole estate, and therefore a fee. He farther observes, that "*all cases depend upon their par-* "*ticular circumstances, and the evidence of the testator's in-* "*tention arising from these.*" This last sentence is the best dictum that I have met with in the books; for the taking the relative situation of the testator and the devisees into view, the branches of the family referred to in the will, and the provisions made, in connexion with the words of the devise, these may assist in demonstrating the intention. But in this case, from the words of the will in the devise

itself, independent of circumstances, I can have no doubt that a fee simple was intended. "*The plantation for the* "*use of the sister's granddaughter during her natural life,* "*and immediately after her decease, to be equally divided* "*amongst her surviving children.*" It could not come to the children until after her decease, because until that time it could not appear what children would be surviving. It was not therefore a devise to her and her children jointly, for they *did not take at the same time.* It was a life estate cut out of the fee, to the mother in the first instance; then *the plantation* to the children. Even did the case rest here, I should have no doubt the testator meant the fee simple after the life estate. But the plantation to *be equally divided.* Can it be possible that he meant a life estate after the subdivision? That a hundred and seventy-one acres should be divided between five, a dwelling house it may be presumed built by each upon his lot of fifty acres, a garden, an orchard, a grass plot or meadow, and that an individual from the *rookery of heirs* should come in at a distant day and possess these improvements? *The subdivision* is conclusive with me that he intended an inheritance.

But it is alleged that the codicil qualifies, and shews that a fee was not intended, viz. "As for and concerning the "plantation, my will is, that the timber thereof shall be pre- "served, and not destroyed by any person or persons what- "soever, firewood and fencing excepted." What can this relate to, but to the life estate to the mother, with which estate such a restraint is perfectly consistent? So far from evincing a qualification of the interest in the tract that was afterwards to be divided, it proves to me the solicitude of the testator to preserve it with wood land as it was, in order that it might be subdivided with convenience of timber to the children, when, on the death of the mother, *they came severally to enjoy it.* At all events it is nothing more, fairly construed according to what we know of the care of an uncle, than a caution or direction in *the use*, and not a qualification of *the interest* in the estate. It would be an unnatural appropriation of the terms to give them that effect.

Now for authority, as it is called; though I will acknowledge, I set little store by the early decisions, when it was a

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struggle with the courts, whether and to what extent they would indulge in wills. Yet I will cite one case referred to in the books, and which looks a little like the case here. "All "the rest of my estate I devise, one third to my wife, and "the rest to my children *equally to be divided between them.*" *Carter* v. *Horner*, 4 *Mod.* 89. In *Skinner* 195., the same case is cited by the reporter, and affirmed to be adjudged "*that* "*all past in fee*, and it was enjoyed accordingly." *A* having three sons, devised to them his *lands equally to be divided.* They have a fee simple; for if the younger had not a fee, he would not have an equal share to the other. 8 *Viner* 237.

I had taken it that the decision in *French* v. *M'Ilhenny*, though without the Chief Justice, yet by force of number, if not by weight of judgment, had become a precedent in our decisions. But in the case of *French* v. *M'Ilhenny* there was more difficulty in making out a fee than in this. Here I take it there is plain sailing. The words "for life" used in the devise to the mother, *omitted in the devise to the children*, is as much as to say, to them *not for life, but altogether.* This is the reasoning of Justice *Wilmot*, who delivered the opinion of the court in the absence of lord *Mansfield*, as reported in 3 *Burrow* 1539. "Devise to *Clement Boreham* "*for and during the term of his natural life*, followed by a "devise to *Sarah Boreham* of another tenement. But in the "devise to *Sarah*, he *omits* the words, *for and during natural* "*life;* which words it must be supposed he would have "*inserted* in case he had intended to give her only an estate "for life, because he had just before done so in the prece- "ding devise to *Clement.* It is plain that by giving it to her "generally, without having any such restrictive words as he "had before added to his devise to *Clement*, that he meant "to give her the absolute property. He meant to devise it "*ut bona et catalla*, as a man unacquainted with the law "might very naturally do." So far Justice *Wilmot;* and if any one will examine the devises to which he refers, he will find the argument holds more strongly in the devise here; because in the devises there, there were distinct devisees, and distinct subjects of devise in distinct sentences; here he will find the devise to the wife and children to be of the same subject, and in the same sentence.

Justice *Wilmot* farther observes in that case, which is also an argument in ours, *that there is no devise over.*

In the case of *French* v. *M'Ilhenny* it is to be noticed that the devise for life was but of *one half of the plantation;* and as to the remaining half, it had not a life estate to support it, and to make it a remainder of the fee simple. As to the half therefore, it must be considered as given nakedly, without any part hewn out; and to have been held to be a fee, by the mere force of the words *bequeath the plantation.* It is true that in that case we had the word *estate* in the introductory part of the will, which was noticed by me, not that I laid any stress upon it in my own mind, but as referring to the English decisions which have laid stress upon it in some cases. For the truth is, I have always thought the argument drawn from the word *estate*, *effects*, *settle* &c. &c. whether introductory, or in the devise itself, to be but a quibble; and to have been adverted to in these decisions as a way of getting over a rule of construction which had better been set aside. It is on the same principle that slight matters have been laid hold of, collateral to the devise itself, to take the case out of the general rule, such as the devisee paying *even a small sum*, say forty shillings.

The heir is said to be favoured by the common law; but *quære*, whether he is so under our laws, where the right of primogeniture has been abolished *or abridged from the earliest period*, and the proprietary grants, and the statutes of distribution, and decisions of the courts, and the policy of the whole law, look to alienation and subdivision of property. But the devise in this case *to a stranger*, savouring of the *testamentum inofficiosum*, I should be disposed to favour the heir; for I would look to the estate as coming from the ancestors, and the right of the testator to devise, as subject in a degree to this consideration, in which the law of descent may find some reason for its policy. In this case the devise is to *a sister's children.* It is *by an uncle to orphans.* It is of a plantation of *his own acquisition*, and which *did not descend to him;* it being the same tract of land, *as he himself recites*, which he bought of *Jacob Jones.* No claim therefore could be grounded on the acquisition of an ancestor, and the interest of a common stock. He was free therefore to dispose of it,

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absolved from all common law consideration. How is the heir to be favoured, who had been passed over with a reasonable provision for him and his children in the same will? I am the more particular in the consideration of this case, from a respect to the Judge of the Common Pleas from whom the appeal comes. And having been led to expect a majority of this court against me, I am solicitous that it may appear that I have strong impressions, if not strong reasons to justify my dissent.

Judgment affirmed.

RACHEL COATES by her next friend &c. *against* THOMAS HUGHES.

Philadelphia, Monday, July 22d.

A subsequent marriage and birth of posthumous or other issue, do not amount by the law of *Pennsylvania* to a total revocation of a will, even where the subsequent issue is the testator's only child. They amount to a revocation *pro tanto*, namely, so far as regards the widow and child, but not as to the appointment of executors, nor as to a power to sell for the payment of debts.

As to personal property, the probate of a will is conclusive while it remains unrevoked; as to realty, it is but *prima facie* evidence. See *Province Laws* 30, act of 1705.

THIS was an ejectment for a messuage and lot in the township of the *Northern Liberties*, which was tried before the Chief Justice at *Nisi Prius* in *January* last.

The material facts were these: *Abraham Coates*, the father of the plaintiff, intermarried with *Frances Miller*, and during her life time, being seised of the premises in the declaration mentioned, he made his last will, dated the 31st of *August* 1797, wherein he devised as follows: The testator in the first place directed that *all his just debts* and funeral expenses *should be duly paid and satisfied* as soon as conveniently could be after his decease. He then gave to his wife *Frances* all his household furniture, plate &c., to his friend *Abia Brown* a lot in *Camden*, and all the rest and residue of his estate real and personal he devised to his brother and sister as tenants in common in fee, with intent that his wife should have one half the income during her natural life, in lieu of dower. He then concluded his will with the following clause: "Item, "I do nominate and appoint my said brother *Jacob Coates*, "and my friends *Abia Brown* and *Thomas Norton*, executors

" of this my last will and testament, and do authorize and " impower them my said executors, and the survivors and " survivor of them, and the executors of such survivor, when " necessary and expedient for the execution of this my will, " to bargain and sell by private or public sale, all or any of " my messuages lands tenements and real estate, and by pro- " per deeds and assurances in the law, to grant and convey " the same to the purchaser or purchasers thereof, his her or " their heirs and assigns for ever." *Frances Coates* died without issue in the life time of the testator, and on the 4th of *May* 1802 he intermarried with *Jane Hughes*, a daughter of the defendant, and died on the 11th of *February* 1804, leaving her enseint with the plaintiff, who was born on the 29th of *April* following.

The will was proved on the 7th of *March* 1804, and letters testamentary granted to *Jacob Coates*, one of the executors, *Abia Brown* having died before the testator, and *Thomas Norton* having refused to act.

On the 25th of *March* 1807 *Jacob Coates* sold and conveyed the premises to the defendant in fee simple for the consideration of 4000 dollars, that sum being the fair value of the property, and several judgments having been entered against the testator in his life time, and others against his executor, for the discharge of which the sale of this estate was essential. The executor by his account filed in the register's office, and which had been settled by auditors and confirmed by consent by the Orphan's Court in order to found an appeal, stated the amount of the inventory at 311 dollars and 94 cents, the amount with which he charged himself, including the proceeds of sale to the defendant, at 5929 dollars and 12 cents, and the debts which had been paid at 4934 dollars and 16 cents, of which last item the defendant paid 3757 dollars and 67 cents, to be deducted from the purchase money. One of the plaintiff's exceptions to this account was, that the executor could have gotten more money for this estate, and therefore should be charged with more.

The principal question was whether the will of *Abraham Coates* was revoked by the subsequent marriage and birth of issue; and to bring this before the court, a verdict was taken for the plaintiff, subject to the opinion of the court whether upon this evidence she was entitled to recover.

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C. J. Ingersoll and *Tilghman* for the plaintiff. The transmission of property, arises, in every society, from provisions of positive law. With a wise regard to the feelings of men, that law has permitted testamentary dispositions, with a view in a great measure to facilitate parents in the performance of the duty which binds them to provide for their families; the same law has with equal wisdom adopted certain rules of construction, to prevent these dispositions from interfering with this duty, or with any presumed intention of the testator. Wills are unstable and ambulatory till death. *Gilb. Dev.* 97. Before the statute of frauds they were revocable by parol. 1 *Roll. Abr.* 614. *Brooke* v. *Ward* (*a*), *Cranvel* v. *Sanders* (*b*). They may by acts of the testator be revoked either in part or in whole, expressly or by implication. It is this principle of implied revocation, which prevents a will from riding over the intention of the testator, by operating in a state of circumstances unforeseen, and for which he either neglected or was unable to provide; a state of circumstances in which his will does violence to both parental feelings and the duty of a husband. A condition is annexed to all wills, that if the circumstances of the testator so change, the will shall not stand.

In the present instance we say that the subsequent marriage of *Abraham Coates* and the birth of the plaintiff, amounted to a complete revocation of his will, so as to destroy the power to sell.

The *civil law*, from which we derive the rule, carries this matter very far. Not only the subsequent marriage and birth of issue, but the birth of any, even a posthumous child, after the will, although there were previous children, amounts to a revocation. 3 *Ferrier's Inst.* 106. *lib.* 2. *tit.* 13. 18. 2 *vol.* 366., 1 *Domat. lib.* 2. *tit.* 1. *sec.* 1. *lib.* 4. *tit.* 2. *sec.* 11. *lib.* 3. *tit.* 2. *sec.* 1. *art.* 8., 2 *Domat. lib.* 4. *tit.* 1. *sec.* 3. *art.* 4., 2 *Cochin* 720. *Cic. de Orat.* 69. 102.

The *common law* reluctantly adopted any part of this doctrine; and it has not been definitely settled until modern times. A very early case in which it makes its appearance, is *Forse* v.

(*a*) *Dyer* 310 *b*. (*b*) *Cro. Jac.* 497.

Hembling, (*a*) where the will of a single woman was held to be revoked by marriage. In 1683 the case of *Overbury* v. *Overbury* (*b*) decided that the birth of a child was a virtual revocation of a will of *personal* estate. In 1696 it was ruled by a commission of delegates, that a bachelor's will of *personalty* was revoked by a subsequent marriage and the birth of children. *Lugg* v. *Lugg*. (*c*) In *Brown* v. *Thompson*, (*d*) 1702, where a bachelor devised his *real estate* to *E. C.* in fee, and afterwards married her, and died leaving her *privement enseint*, it was held to be *no* revocation, although lord keeper *Wright* was of opinion that an alteration of circumstances might in some cases amount to a revocation even as to real estate. Lord *Hardwicke* in *Parsons* v. *Lanoe* (*e*) 1748, thought that the statute of frauds made a great difference between wills of personalty and of real estate; and though he did not decide, strongly doubted whether subsequent marriage and issue would revoke a will of lands. In *Jackson* v. *Hurlock* (*f*) a few years after, he was clear that marriage alone would not. He evidently leaned much against this kind of revocation. But notwithstanding his great name, the stubbornness of the common law was fast yielding to the reasonable doctrine of the civil law, and in a few years it was settled upon nearly the basis on which it now stands. In *Christopher* v. *Christopher* (*g*) in the Exchequer in 1771, a subsequent marriage and the birth of issue were held to revoke a will of lands; and in 1773, in the case of *Spraage* v. *Stone*, (*h*) the same point was decided by the three chiefs upon appeal from the court of Chancery in *Jamaica* to the King in council; so that it is not at this time of day to be shaken. The cases of *Cook* v. *Oakley* (*i*) and *Wellington* v. *Wellington*, (*k*) shew that the most eminent judges came at last to be satisfied with this rule, and probably led the way to it by their occasional *dicta*.

In tracing the progress of this principle from the earliest case down to *Doe* v. *Lancashire*, (*l*) where it was settled that

(*a*) 4 *Rep.* 60.
(*b*) 2 *Show.* 242.
(*c*) 2 *Salk.* 592. 1 *Lord Raym.* 441. S. C.
(*d*) 1 *Equ. Abr.* 413.
(*e*) *Ambler* 557. 1 *Ves.* 190. S. C.
(*f*) *Ambl.* 495.
(*g*) 2 *Burr.* 2182. *note.*
(*h*) *Ambler* 723.
(*i*) 1 *P. Wms.* 304.
(*k*) 4 *Burr.* 2165.
(*l*) 5 *D. and E.* 49.

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a posthumous child came as much within it as one born before the testator's death, two remarks cannot be avoided; first, that marriage alone, or the birth of issue alone, or the birth of one child there being a previous child or children, is no revocation; and secondly, that if the will is affected at all, it is revoked in *toto*. *Shepherd* v. *Shepherd* (*a*), *Driver* v. *Standring* (*b*), *Brady* v. *Cubitt* (*c*), *Pow. on Dev.* 554., *Lovelass* 171., *Richardson* 306., 2 *Bl. Comm.* 376.

We come then to the law of *Pennsylvania* of the 19th *April* 1794., 3 *St. Laws* 532., which we conceive has no effect upon the cause. The 23d section enacts "that where any "person, from and after the passing of this act, shall make "his or her last will and testament, and afterwards shall "marry, *or* have a child or children not provided for in any "such will, and die leaving a widow and child, or either "widow or child, although such child or children be born "after the death of their father, every such person, so far as "shall regard the widow, or child or children afterborn, "shall be deemed and construed to die intestate, and such "child or children shall be entitled to such purparts shares "and dividends of the estate real and personal of the de-"ceased, as if he or she had actually died without any will." It then authorizes the Orphan's Court, so far as regards the wife after married, or the child or children after born, to make partition, or where that cannot be done without prejudice to the whole of that part of the estate devised to any child or children, to value, and order the premises to the devisee or devisees, and on his and their refusal, to the children successively, as where a person dies wholly intestate.

This act does not toll the common law for two reasons: it contains no negative words, and it was made not to supersede but to supply the defects of the common law. Nothing can be more clear than that the common law must govern, unless it can be plainly discovered that the act intended to repeal it. What the common law was, was well known at the passing of the act. It did not provide for the case of a subsequent marriage alone, or subsequent issue alone, or issue where there was previous issue. This act does, but it goes no fur-

(*a*) 5 *D. and E.* 49. *note.* (*b*) 2 *Wils.* 89. (*c*) *Doug.* 30.

ther. It embraces the case of a man who makes a will and marries *or* has a child or children. It leaves the case of a subsequent marriage and issue, as it stood at common law. It is affirmative as to these cases, it is not negative as to the other. Now the principle of the common law being that the testator did not intend that his will should stand in the event of marriage and issue, it works a total revocation; and therefore if this act, which makes only a partial revocation in certain cases, does not reach a certain other case which is ours, our case must still be as at common law, and therefore a total revocation. In fact the act contemplates the case of somebody to take under the will, together with the child. The child is to take such *purpart* as if the father had died intestate. The Orphan's Court is to make partition and to adjudge it to the devisees and the subsequent child in succession, until some one of them will accept. This cannot be, where, as in the present case, nobody is to take under the will, and therefore it does not apply to the present case.

It must be agreed that none of the bequests in this will can stand; then why the power to sell? If it stands, it must be upon the ground of intention; whereas the argument for it is upon the ground of expediency. There is no magic in the authority to sell and pay debts. It is of more importance in England than it is here, where we may resort to an Orphan's Court. Yet if such a clause is inserted in a will of lands in *England*, that authority is revoked as well as all others. In *Spraage* v. *Stone* there was an order to the executors to sell negroes and stock, and to pay debts, yet the whole will was revoked; and in *Wellington* v. *Wellington*, where there was a trust to pay debts out of the rents and profits, which is highly favoured in that country, it was not thought to make any difference.

There is no hardship. The defendant had full notice of all the facts. But nevertheless we are willing to pay for improvements and the first cost.

Sergeant and *Rawle* for the defendant. It is of no importance to the plaintiff whether she recovers or not, because the estate must still go to pay the testator's debts; but it will be a loss to the defendant of his trouble and the rise in value.

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Be this however as it may, we contend 1. That the plaintiff can never recover. 2. That she cannot recover while the probate of this will is unrepealed.

1. The will contains certain provisions which are at an end, and others which are in force, that is to say, others which are perfectly appropriate to the existing state of things,—as the payment of debts, and the power to sell for that purpose; and taking the act of 1794 in connexion with the legal history of the state as it relates to the payment of debts, it will appear very obvious, that the legislature intended that there should be no revocation of such a power in consequence of subsequent marriage and issue.

The act of assembly, though it has no negative words, implies a negative. It provides for every case at the common law, and for more. It embraces this very case of a man's dying and leaving a widow *and* child not provided for in his will; and declares the whole effect of it to be, that *so far* as shall regard the widow or child after born, he shall be deemed to have died intestate. It is not possible to imply more clearly that the intestacy shall go no further. It does not revoke a devise for the payment of debts, an appointment of executors, or any powers whatever, except such as would have a tendency to diminish a child's or widow's share. It merely gives a widow or child the same share as in case of intestacy, which is what remains after payment of debts. It is contrary to the spirit of all the laws of *Pennsylvania*, to consider a testator as having a right to dispose of any part of his estate to children or widow, but what remains after payment of debts; and of course it must be contrary to the spirit of those laws to revoke a devise or power for the payment of debts, when its object is only to give the benefit of intestate succession to an afterborn child.

That a child's share is what remains after payment of debts, is clear from a review of the acts of assembly.

The first proprietary began with a provision to this effect among the laws agreed upon in England. "All lands and "goods shall be liable to pay debts, except where there is "legal issue, and then all the goods, and one third of the "land only." *Prov. Laws, App.* 4. In 1682 the portion made liable to debts in case of issue, was increased to one half,

if the land was bought before the debts were contracted. *App.* 7. And finally in 1688 all lands were made liable to debts, by an act of that date. *App.* 10. The first law disposing of the estates of deceased persons, was passed in 1683; it gave one third to the wife of the party, one third to his children equally, and the other third "as he pleased," *his debts being first paid. App.* 9. It was followed by a law in 1693, which after exposing all the lands of the decedent to his debts, and appointing the order of payment, directed that "the surplusage or residue if any be of the testator's personal estate, shall be distributed by the executors according to "their last wills; and *if* the testator's personal estate shall be "sufficient to pay the debts, then the real estate shall remain "as their last wills devise the same." *App.* 13. This act was supplied by a similar one passed in 1700. *App.* 16. In 1705 the legislature in a general law for the settlement of intestate's estates, order a distribution only of the *surplusage*, "after debts funeral and just expenses of every sort "paid;" *Prov. Laws* 33.; and the same terms are used in the act of 1711. 1 *St. Laws*, *App.* 43.

Such was the situation of our code, when the first law relating to the particular question in this case, was passed in 1764. 1 *St. Laws App.* 47. The terms of the 5th section of it are the same as those of the 23d in the *Act* of 1794, except that the first act has a retroactive effect to the 4th of *February* 1748; and both it and the existing law which supplied its place, acknowledge in the strongest terms the lien of debts upon real estate, and limit by the plainest implication the testator's power over it to the surplusage after debts paid. It is therefore this surplusage that the legislature had in view when securing the interest of the afterborn child or widow. The appointment of an executor, and an authority to sell for the payment of debts, cannot be affected. It is the view of the legislature to confirm rather than defeat them, to adopt the testator's agent rather than an administrator, to have the debts satisfied through the medium of the testator's appointment, rather than by an application to the Orphan's Court, or a sheriff's sale. They have shewn a particular regard for this testamentary power to executors, by transferring it even

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to the administrator with the will annexed. *Act of* 12th *March* 1804. 4 *St. Laws* 593.

There can be no doubt that where children are born before as well as after, the power of the executor will remain as to the former. It would be very pernicious if it ceased to exist as to the others.

The transaction has been perfectly fair, the property has brought its full value, and it has been applied to the payment of debts. Under such circumstances, though the power were defective or defectively executed, this court would support it for the sake of creditors, if not of the purchaser. *Pollard* v. *Greenville* (*a*), *Hannum* v. *Spear* (*b*), *Graff* v. *Smith* (*c*). The plaintiff herself affirms it, by claiming the benefit of the sale, and what more the executor could have obtained.

2. If however the will is totally revoked, still this suit is premature, while the letters testamentary remain in force. The will must be revoked, before an ejectment can be maintained for land devised by it. There is a difference between the law of *Pennsylvania* and of *England*. There a will is proved in the ecclesiastical court, merely as to personalty; as to real estate it can only be done in an adversary suit at law, or in equity, and then *pro hac vice*. Here the probate of both is before the same officer, and the effect given to them must be the same. In *England* and in *Pennsylvania* a probate as to personal estate is conclusive; it must be the same as to a will of lands. [TILGHMAN C. J. Has not the contrary been the practice? YEATES J. It has been held that as to personalty the probate is conclusive; as to realty it is only *prima facie*.] The inconveniencies of such a distinction would be very great. Very slight evidence will put the devisee to the whole proof again, even after an issue of *devisavit vel non*. [The Chief Justice said he thought that the probate had been held to be not conclusive in the case of one *Flower's* will, and that he would during the adjournment examine the notes of the late Judge *Smith* for some other cases. Accordingly on the next day, he told the counsel that the law had been settled in *Vangordon* v. *Vangordon*, where the probate was

(*a*) 1 *Cha. Ca.* 10. (*b*) 2 *Dall.* 291. (*c*) 1 *Dall.* 481

held to be but *prima facie* evidence. The point was of course no further pressed.]

TILGHMAN C. J. *Abraham Coates*, the father of the plaintiff, made a will during the life of his first wife, by which he disposed of all his real and personal estate, and having ordered his debts &c. to be paid, he gave power to his executors to sell any part of his estate when necessary and expedient for the execution of his will. The first wife died, having never had issue. Afterwards, the testator married a second wife, the mother of the plaintiff, and died leaving his wife *enseint*. The plaintiff was born about two months after her father's death. The question is, whether in consequence of these circumstances the will was revoked *in toto*, or only so far as related to the interest of the *plaintiff and her mother* in the estate of *Abraham Coates*.

Marriage and the birth of a child, both subsequent to the making of a man's will, are circumstances by which his situation is so completely altered, that it cannot reasonably be supposed he intended the will to remain in force. Such was the presumption of the *civil law;* but it was long before the same principle was ingrafted on the common law. *The lawyers* and the *people* of *England* have always shewn a marked jealousy both of the *principles* and *practice* of the civil law. But by degrees, in cases where the civil law is clearly right, jealousy gives way to good sense and justice. First of all it was agreed, that subsequent marriage and issue should operate as an implied revocation of a will of *personal* estate. As cases occurred, which turned the minds of the judges to this subject, it was perceived there was no solid ground for a distinction between *real and personal* estate. At length it was settled in the cases of *Christopher* v. *Christopher*, decided in 1771, and *Spraage* v. *Stone*, decided in 1773, that a subsequent marriage and issue should be an implied revocation of a will of *land*. Prior to this, in the year 1764, the legislature of *Pennsylvania* being struck, in consequence of an event which took place in the city of *Philadelphia*, with the imperfection of the common law as then understood, made a provision for all cases which could occur under a subsequent marriage. The act of 1764 has been repealed, but it is unne-

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cessary to say more of it, as it was in substance reenacted by the act of 19th *April* 1794, sect. 23, which is as follows,— "Where any person shall make his last will, and afterwards "*marry*, *or* have a *child* or *children* not provided for in such "will, and die leaving a *widow and child*, *or either widow or* "*child*, although such child or children be born after the "death of their father, every such person, *so far as shall re-* "*gard the widow or child or children after born*, shall be "deemed and construed to die intestate, and such child or "children shall be entitled to such purparts, shares, and divi- "dends of the estate real and personal of the deceased, as "if he or she had actually died without any will &c." The case before us is comprehended in this act, and upon a literal construction the testator is to be considered as dying intestate, so far as regards the widow and child, and no further. But the counsel for the plaintiff insist on the will's being void *in toto*. The act of assembly, say they, is affirmative, and therefore does not interfere with the provision of the common law. That indeed is the point on which this cause turns. The common law must govern, unless it can be fairly inferred from the act of assembly, that it ought not to govern. It appears to me, that it was the intention of this act to make a *complete provision* for the case in question, and that the common law has no room for operation. Here is a marriage and a child born, subsequent to the will. In such case, says the act, the testator shall be deemed to die intestate, so far as shall regard the widow and child. Although not expressed, it is necessarily implied, that the intestacy shall go no further. Why should it? The will may contain very useful provisions, not interfering with the interest of the widow and child. The case before us shews it. By our law land is subject to the payment of debts. The management of the sale of the land is a matter of importance. Much depends on the integrity and ability of the person to whom this trust is committed. The testator having made a selection of a trustee from his own personal knowledge and experience, what good reason can be assigned for substituting another in his place, especially as such substitution must be attended with additional expense? But this is not the only point of view in which the subject is to be considered. We are now

about to establish a general rule, which will extend to all cases in which the common law revokes a will in consequence of marriage and issue. A will may contain other useful provisions, besides a power to sell for payment of debts. It may authorize an executor to execute conveyances, and carry into effect contracts made by the testator in his life time. The testator may have been himself the executor of some other person, and the executor appointed by him will succeed to his trust. But if the will is void *in toto*, this succession will be destroyed. The act of assembly seems therefore to have made a *better* provision than the common law. At all events it is a *different* provision, and therefore by necessary implication the common law is taken away.

But it has been contended, that the only case in which the act leaves *part* of the will in force, is where part of the estate is devised to *children*. This argument is founded on a subsequent part of the 23d section which I have not yet mentioned. I think it is too much strained. The part of the act alluded to makes provision for *partition* to be made by order of the Orphan's Court. That this power *to make partition is* confined to cases where part of the estate is devised to children, may be true; but to say that the act makes *no provision for any other case*, is begging the question in dispute, and is contradicted by the former part of this section, which makes complete provision in other cases.

Upon the whole, I am of opinion that the will of *Abraham Coates* was not revoked *in toto*, but remained in force so far as related to the appointment of executors, and the power given them to sell the lands for payment of debts.

YEATES J. I consider the present case as governed by the provisions of the 23d section of the act of assembly passed on the 19th *April* 1794, 3 *Dall. St. Laws* 532., and to fall within the express words of that law. *Abraham Coates* made his will in 1797, after the passing of the act, and died leaving a widow to whom he was married in 1802, and a child born after his death, who of course were not provided for in his will. So far as regards his widow and child, he must be deemed to have died intestate; and the plaintiff his child was intitled to such share of his estate real and personal, as if he had actually died without any will.

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It cannot be denied, that the inconveniences resulting from the state of the common law, produced this section of the act of *April* 1794. Marriage alone and birth of children alone, were not sufficient to operate the revocation of a previous will; and however strongly the inclination of the courts was with the children, they held that they could not set aside a solemn will, because some of the children were left unprovided for. 5 *T. R.* 54. *note.*, 4 *Bur.* 2171. 2182. It is obvious, that the legal presumption arising on an alteration of circumstances not contemplated by the testator, that such was not his will, and that he would have made a very different testament if he had not been prevented by accident or ignorance, must in many instances have disappointed his real intentions, when those events have been construed to amount to a total revocation of his will. The legislature by their act of 23d *March* 1764, 1 *Dall. St. Laws, App.* 48. *s.* 5. pursued a juster system, and better calculated to carry into execution, what might reasonably be supposed to be the dictates of an honest mind. "So far as shall regard the widow, "or child or children afterborn, the party shall be deemed "and construed to die intestate." So forcibly were the lawmakers struck with the propriety of this provision, that they give it a retrospective operation as to all wills made from and after the 4th day of *February* 1748. The 23d section of the law of 1794 agrees substantially with the 5th section of the law of 1764, except that the words of the law now in force are more minute and particular.

But it has been contended, that the present case is not embraced by this law, which only respects cases where other children share with the afterborn child; and that this is manifested by the powers granted to the Orphan's Court in the concluding terms of the section. It is said to contemplate the case of a child as devisee under the will, and that the expressions "*such* part of the estate as cannot be divided" &c. refer to other shares; and that though it goes further than the common law does, as in the instance of a widow alone surviving her husband, yet in the case of a widow and child surviving the common law still remains, the act of assembly implying no negative therein.

To this it is properly answered, that the principal case

falls within the terms of the preceding part of the section, and the powers delegated to the judges of the Orphan's Courts do not derogate from this exposition thereof. If only the child born after the making of the will survives the parent, the whole of the real and personal estate descends to such child, after payment of debts and funeral expenses, without any order of the Orphan's Court. If the widow and the child survive, then partition may be made between them of the lands agreeably to the 22d section of the act on a petition presented to the Orphan's Court. If the lands are devised to a child, then partition may be made between such child and the issue born after making the will; or the premises may be valued, in case partition cannot be made without prejudice to or spoiling the whole of that part of the estate devised to such child. It is perfectly clear, that the case before the court is within the reason and spirit of the law; and it is equally clear from our whole system of laws, as well as from the third section of the act under consideration, that heirs can only take under the ancestor the remainder of his estate real and personal, after payment of his debts.

Marriage after the making of a will, or leaving a child born subsequent thereto and not provided for therein, is only a revocation *pro tanto*, so far as the widow and child are interested, under the plain meaning of our act of assembly; but by the common law, marriage and the birth of a child subsequent to the will operate as an entire and total revocation thereof. This forms a strong distinguishing feature between the two codes. In the view which I have taken of the subject, I conceive that the appointment of executors would remain in full force, notwithstanding the subsequent marriage and having issue; and that a power granted to the executors to sell the real estate, would continue unrevoked, provided such sale did not injuriously affect the interests of the widow or child, as to their purparts shares and dividends of the estate real and personal of the deceased.

Here the creditors of *Abraham Coates* were pressing for their demands, and some of them had even proceeded to judgment against him in his life time, and against his executors after his death. The personal estate was inadequate to the discharge of the debts. To effect this object, one of three

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modes must necessarily have been recurred to; a sale of the lands by the sheriff, or by an administrator raised up for that purpose under an order of Orphan's Court, or by the executors named in the will. The last measure has been adopted; and after every prudent precaution had been used to insure a fair price for the lands by public advertisement in 1805, the same were sold and conveyed to the defendant for 4000 dollars, their full value, on the 25th *March* 1807. It was proved on the trial that 3750 dollars has been expended in payment of the debts of *Abraham Coates*, and that several debts still remain unpaid. The defendant has made some small improvement on the land. The plaintiff's counsel declare their willingness to be subjected to such terms, as the court may impose in favour of creditors, but at the same time insist that their client should have the benefit of the increased value of the property. Their claim in this particular in my idea, can rest on no other equitable grounds, than that the creditors were willing to wait for payment of their demands, which is contradicted by the evidence exhibited on the trial. If the land had not been sold by the executor, it must unavoidably have been sold by the sheriff at an increased expense, and most probably it would have been struck off at an inferior price.

I scarcely need subjoin, that the tenth exception taken to the administration account exhibited by the executor, which is now pending in this court by appeal from the Orphan's Court, that the land was not sold at a full and fair price, is directly opposed to the recovery of the land itself.

On the whole, I am of opinion with the defendant on the reserved point.

BRACKENRIDGE J. " A will may be revoked either absolutely or conditionally, in all or in part; and if it be revoked " only in part, the rest will stand." *Powel on Devises* 614. This is with respect to a particular devise in a will; as in the case of a devise in fee to *A*, and afterwards a mortgage of the premises to *B*, it is a revocation of the devise to *A*, so far as to subject it to the mortgage. And " revocations *pro* " *tanto* may affect it, either by altering the quality of the " estate, in abridging the *interest in*, or diminishing the

"*quantity* of the thing devised." *Id.* 623. Carry this principle out, and what hinders a revocation of the whole devise to one, and yet the will stand as to devises to others? What is in the way of a revocation of every devise, and yet the will stand as to some purposes, such as *the appointment of executors?* I can see nothing, and will so hold it. The administration of the personal estate, the sale of lands for the payment of debts, may be, and is in most cases, a great object. It is a matter of moment that there be a power to sell lands and pay debts in the first instance, to save the expense of process, or application to an Orphan's Court; and why supersede the commission of appointment, if it may be so called, by the testator himself, in the constituting his executors? I can see no necessity for it; but that this power may stand, even though every other part of the will be set aside.

The act of assembly itself of the 19th *April* 1794 evidently looks to a *setting aside in part.* The words, "*so far as shall* "*regard &c. shall be deemed and construed to die intestate,*" imply a partial avoiding of the will, and not a total revocation.

This being the only point in the case which appears to me to have remained to be settled, I shall say nothing of the question as to a man's being married when he makes his will, and not a bachelor, and afterwards marrying and having a child; for *the reason* is the same in both cases, and *the law* must be the same. It has already been decided in the *English* books. Nor, were it the case of a married man having children, and making his will and dying, and one after born of whose existence he could not be supposed to have had a knowledge before his death, would there be any difference, there being the same reason. The revocation, or rather the annulling, avoiding, or setting aside, in these cases, is *by operation of law;* but need be carried no farther than *quoad hoc*, unless the case should be such, that the avoiding one part must in the nature of it avoid the whole, of which I cannot conceive an instance at this moment of my recollection. *I take every will to be subject to such a disposition of the law* in favour of humanity, that *in a case where the testator was under a natural and moral obligation to provide for his offspring, whose existence he did not know, the law will do it*

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for him; though had he known of the existence, the common law would not go so far as the civil law, and set aside an inofficious testament. This goes on the idea, that he must be supposed tacitly to have annexed a condition to his dispositions, that these shall stand, provided no such change happens in the relations of his duty as shall call for a different distribution. In the case before us I think the sale good, there being *no fraud in fact* in the consideration of the purchase, and the object of making sale being honest, and what the law would in another way have compelled, *the payment of debts.* Nor, strictly taken, do I think the sale void, taking into view the person of the vendor or vendee, when it is to supersede what has been done for the good of all concerned at the time of the transaction; it being the mere accidental rise in the value of property subsequent to the sale, that has given rise to the wish of avoiding it. I think the unfairness and dishonesty are all on the other side, if there is any on either side, and are not to be favoured.

Judgment for defendant.

END OF MARCH TERM, 1811.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

3b 515
5b 220
5b 223
3s r258
2w 21
2w 22
2w 353
4w 393
4w 394
12 202
59 491
67 208
67 209

67 PSR. 203

Lancaster District. May Term, 1811.

BORNMAN *against* BOYER.

IN ERROR.

1811.

Lancaster, Saturday, May 25.

THE defendant in error was sued in the Common Pleas of *Dauphin* for slander, the declaration charging that in a conversation with a certain *Henry Reigart*, he maliciously and falsely uttered and spoke the following false, scandalous, and malicious words of and concerning the plaintiff: *I* (the defendant meaning) *have lost a calfskin out of my cellar the day that you* (the said *Henry Reigart* meaning) *and Bornman* (the plaintiff meaning) *got the leather, and there was no body in the cellar that day but you*, Bornman, *and* Gray, *and I do not blame you nor* Gray, *but* Bornman *must have taken it*, (thereby meaning that *Bornman* had stolen the said calfskin.) The jury found a verdict for the plaintiff, with twenty dollars damages; and upon motion, the Common Pleas arrested the judgment, upon the general ground that the words were not actionable.

"I have lost a "calfskin out "of my cellar "the day that "you and *Born-* "*man* got the "leather, and "there was no- "body in the "cellar but you, "*Bornman* and "*Gray;* and I "do not *blame* "you nor *Gray*, "but *Bornman* "must have "*taken it,*" is slander; and without any *colloquium* of a felony, an *innuendo* that the defendant thereby meant that *Bornman* had *stolen* the said calfskin, was held good to support a judgment after a verdict for plaintiff.

Hopkins for the plaintiff in error. The words are equivocal, and susceptible of different meanings; but the jury have fixed their meaning in this case, by finding the *innuendo* to be true. The words themselves without any forced construc-

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tion, signify a *blamable* and also a *secret* taking, and therefore the *innuendo* that they meant a *felonious* taking, is perfectly correct. It is the legitimate office of an *innuendo* to elucidate words by connecting them with the subject to which they refer, and to aver a meaning not inconsistent with or contradictory to them, *Shaffer* v. *Kintzer*, (*a*) which is the case here. The *innuendo* interprets the words as every body would understand them, and that is the rule; not a forced interpretation to screen a party from punishment, who has perhaps used ambiguous words for the purpose of doing mischief the more effectually. 6 *Bac. Abr.* 234. *Slander L. Rue* v. *Mitchell.* (*b*) In *Brown* v. *Lamberton*, (*c*) this court held that the charge of *playing* with a married woman in a fodder room, with an *innuendo* of adultery, was actionable. That case is full in point.

Laird for the defendant in error. An *innuendo* can neither add to nor alter the natural and common signification of the words spoken; nor does the finding of the jury establish the fact that the innuendo has averred the real meaning, and that such meaning is true. If it did, then the finding of a jury would be conclusive against the defendant in all cases, where an innuendo was drawn with sufficient skill. Had there been in the present case a colloquium concerning the felony of a calfskin, that might have helped it; but the first place in which there is any thing that bears the least resemblance to a charge of felony, is at the introduction of the innuendo. A taking may be a trespass. Something should exist in the conversation of the parties at the time, or in the words themselves according to their common acceptation, to shew that the defendant meant a felonious taking. It should not be left to an innuendo for explanation; for nothing which would otherwise remain uncertain, can be reduced to certainty by an *innuendo*. It means the same as *aforesaid*, "*id est*," "*scilicet*," and the like, referring to some thing that before was certain. *Craft* v. *Boite*, (*d*) 6 *Bac.* 249. *Slander S.* 4. In *Oldham* v. *Peake*, (*e*) where the words were, "you are a bad

(*a*) 1 *Binn.* 537. (*c*) 2 *Binn.* 34. (*e*) 2 *Wm. Black.* 959.
(*b*) 2 *Dall.* 59. (*d*) 1 *Saund.* 243. *note* 4.

"man, and I am thoroughly convinced that you are *guilty*," (meaning of the *murder* of the said *Dolly*), there was a colloquium concerning the death of one *Dolly*, between the plaintiff and defendant, and the common acceptation of the words must have been of that kind of death of which a man might be guilty, namely murder. In *Brown* v. *Lamberton* the words contained a direct assertion that a child was the fruit of that intercourse which was termed *playing*. They were parts of the same sentence, and an *innuendo* was scarcely necessary. But there being no colloquium here, and nothing in the words according to their common acceptation imputing a charge of felony, it follows that the judgment was properly arrested.

Hopkins in reply. The object of a colloquium is to put a new fact on the record, where the words themselves do not communicate that fact, and yet their being actionable or not depends wholly upon it; as in the case of words which are actionable only in consequence of the party's trade. But there is no necessity for a colloquium where the words themselves refer to the party's trade, *Read* v. *Holgate*, (*a*) nor where they contain all that is necessary to constitute slander, as they do here. A secret and blameable taking charged in the manner this was, cannot but imply felony.

TILGHMAN C. J. The error assigned in this case is, that the words laid in the declaration are not actionable. The defendant contends that he only said, that the plaintiff *took* his calfskin, and not that he *stole* it, and that the innuendo cannot alter the meaning of the words. Where words will bear several meanings, the plaintiff has a right to aver by an innuendo, the meaning with which he conceives they were spoken, and it is for the jury to decide whether he is right. It must not be supposed, that one may blast the character of his neighbour by insinuating slander, wrapped up in equivocal expressions, and then escape, under the subterfuge of not having expressly called him a thief. It appears from the whole of what the defendant said, that he charged the plaintiff with

(*a*) 2 *Lev.* 62.

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taking his calfskin in a *secret* and *blamable* manner. There are several kinds of taking which are illegal. Taking may amount to a trespass or a felony. Taking is the *genus*, and trespass or felony the species. The jury have said that the defendant meant a *felonious* taking, and I believe that is the sense in which most people would understand the words. In *Oldham* v. *Peake*, 2 *Black. Rep.* 959., it was stated in the fifth count, that the defendant in a conversation concerning the *death* of *A*, said to the plaintiff, "you are *guilty*," (innuendo of the *murder* of *A*). This was held to be good, because the conversation was concerning the *death*, and *murder* is one kind of death. Yet manslaughter is another kind of death, of which a man may be *guilty*. That case is fully as strong as the present. I am of opinion that the declaration is good, and that the judgment of the court of Common Pleas should be reversed, and judgment entered for the plaintiff.

YEATES J. The judgment has been arrested in this action in the court below, and the only question is, whether the words as stated in the plaintiff's declaration are actionable.

The law will not permit a person to go unpunished, who slanders the reputation of another by finesse. Words of report, injurious to character by the imputation of a crime, are the foundation of a suit; as "I have heard a bird sing," or "I dreamed" that *B* stole &c., 1 *Lev.* 277. So of words spoken by way of interrogation. *Cro. Jac.* 422. 568. And even of conditional words. 3 *Bulstr.* 260., *Hob.* 180. At the same time, such vindictive suits cannot be maintained, unless the words contain an express imputation of some crime liable to punishment, and the charge upon the person spoken of be precise; or when the words may be of probable ill consequence to a person in a trade, profession or office. These are the two general rules which govern in actions of slander. 3 *Wils.* 186., 2 *Bl. Rep.* 752. The words must be taken in their plain and ordinary import without addition or diminution. And what is their natural and obvious meaning as laid? "I have lost a calfskin out of my cellar, the day that "you (*Henry Reigart*) and *Bornman* got the leather, and "there was nobody in the cellar that day but you, *Bornman* "and *Gray;* I do not blame you nor *Gray*, but *Bornman* must "have taken it."

The words convey censure unquestionably on the plaintiff; but in the language of the rule, do they convey a charge of felony? The last innuendo charges, that by *taking* was meant stolen; and it is contended, that by the jury's verdict the truth of the innuendo is found. The office of an innuendo is to explain matter sufficiently expressed before. In *Shaffer* v. *Kintzer*, 1 *Bin.* 543., this court said, "If innuendoes can "alter the meaning of words, they may be employed to very "mischievous purposes. A man may be responsible not for "what he said, but for what other persons may suppose he "intended to say." In that case the expressions were, "he has "sworn false," (meaning thereby that he had perjured himself.) But though the jury ascribed that meaning to the words, the judgment on their verdict was reversed here. The colloquium however in that case was of an extrajudicial affidavit, made before a justice of the peace. There is no such rule, as that the finding of the jury fixes the meaning of the words conclusively. On the contrary, the court is bound to determine whether the words are actionable, upon reasons filed in arrest of judgment; and where they are of opinion that they will not support an action, uniformly arrest it. In this case, it appears to me that the innuendo in the close of the declaration, does not carry the meaning of the expression *take* beyond its common and natural sense, when the words laid are fully considered. The expressions exclude all idea in the mind of the speaker, that the taking was with his consent or even knowledge; and strongly imply that the act was done secretly. This then comes up to the old legal definition of larceny, "*fraudulenta obtrectatio* "*rei alienæ, invito domino.*" And it is of weight with me, that the jury have found by their verdict, that the words were spoken *maliciously*. I would not be understood to say that this case is free from doubt; but I think my construction of the words is warranted by the case of *Oldham* v. *Peake*, 2 *Bla. Rep.* 959., and the authorities cited therein by the plaintiff's counsel.

I am of opinion that the judgment below be reversed, and that judgment be entered for the plaintiff.

BRACKENRIDGE J. concurred with the Chief Justice.

Judgment reversed.

3o 530
16s 289
3e 410
1w 295

1811.

Lancaster, Saturday, May 25.

The COMMISSIONERS of Berks County *against* ROSS and others.

If the obligee undertakes to discharge the principal, or in any considerable degree to lessen his responsibility, without consulting the surety, the surety is discharged; but the mere acceptance of a common appearance in a suit by the obligee against the principal, in consequence of which the latter executed an assignment to secure part of the debt, has no effect upon the obligation of the surety, although it furnished the principal with an opportunity to leave the state.

THIS was an appeal from the decision of Judge *Brackenridge* at a Circuit Court for *York* county in *May* 1809.

The action was debt upon a bond given by the defendants to the plaintiffs, to secure the performance of a contract made by a certain *Obadiah Osburn* with the plaintiffs, to build a bridge over the *Schuylkill* at *Reading*. *Osburn* did not comply with his contract; and in *June* 1804, the commissioners sued him in covenant, and demanded bail in 5000 pounds; but they afterwards without consulting or giving notice to his sureties, accepted his appearance, on his assigning to them all his property on account of the moneys which they had advanced him. After being discharged, he left the state. The commissioners sold the property, the proceeds of which reduced their demand to about 8000 dollars, for which the present action was brought. There was no dispute about facts, and the charge of the court was in favour of the plaintiffs; but the jury, as another jury had done before, found for the defendants, and judge *Brackenridge*, although the verdict he said was decidedly against his opinion, overruled a motion for a new trial, that it might be heard in bank upon appeal.

There is no rule of law against granting a new trial after two concurring verdicts, nor will the court hesitate to do it, if the verdicts are against law.

Hopkins for the plaintiffs. The verdict was most clearly against law, evidence, and the charge of the court; in fact so clearly, that the only question in the case is, whether the court will grant a new trial after two concurring verdicts against law. If they will not, there is an end to all certainty in the law, and to all stability in the possession of property. The prejudices, or the honest but erroneous feelings of a jury, accompanied with sufficient obstinacy, will triumph over the authority of the court. As to the facts in this case there was no dispute. The execution of the bond by the de-

The principle which has governed courts in refusing the plaintiff a new trial, where his demand has been a *hard* one, does not in any degree apply to actions against sureties for the default of a principal. Although a surety may be distressed by the demand, yet it is not in point of law a *hard* one.

fendants, the nonperformance of the contract by *Osburn*, and the damage to the plaintiffs in consequence of their advances, were indisputable; the only point in the case was a point of law, arising out of the discharge of *Osburn* upon a common appearance, instead of taking bail; and as to this there could be no doubt that it was with the plaintiffs. They were not bound to consult the defendants as to the discharge of *Osburn* from arrest, because they were not bound to arrest him at all. How they should sue, and whether they should sue or not, was a question for themselves only. But suppose it was not, the inquiry as to the surety always is, whether in equity he is intitled to relief, in consequence of an injury he has received by the conduct of the obligee to the principal; and it was plain here that the sureties were benefited by the discharge of *Osburn*, as the commissioners in consequence of it got an assignment of all his property, which has been sold, and credited to the defendants. The jury could have had no other reason for their verdict, but that the county was on one side, and individuals on the other.

Bowie for the defendants. The commissioners are intitled to no favour as against the defendants, because the very plan of the bridge which *Osburn* contracted to build, was impracticable in the estimation of every one who saw it, and yet the commissioners proceeded to advance him nearly ten thousand dollars for the object. Their own indiscretion has produced the loss; and under existing circumstances, the county should be made to bear it. The demand is obviously a hard one against the defendants. They have received no consideration, the loss results in some measure from the imprudence of the plaintiffs, and therefore as the jury has fixed it upon them, the court ought not to shift it. A motion for a new trial is to the discretion of the court, to their sense of equity and justice; and although an established principle of law may be with the plaintiff, yet in a hard action they will not disturb the verdict of a jury against him. *Dunkly* v. *Wade* (*a*), *Smith* v. *Brampston* (*b*), *Deerly* v. *The duchess of Mazarine* (*c*),

(*a*) 2 *Salk.* 653. (*b*) 2 *Salk.* 644. (*c*) 2 *Salk.* 645.

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Goslin v. *Wilcock* (*a*). But the point of law was in the present case with the defendants. Sureties are highly favoured in equity, where they are never made responsible except upon the clearest grounds. *Radcliffe* v. *Graves* (*b*), *Sheffield* v. *Lord Castleton* (*c*). If the obligee gives up a tittle of his hold upon the principal, the surety is discharged. He has no right to say, I will give up a security I have against the principal, either in his person or property, and resort to his surety. The surety has in equity an interest in the obligee's obtaining the full benefit of any lien he has upon the principal or his property; and if he surrenders this without consulting the surety, there is an equitable bar to his claim upon the latter. Here the principal was under arrest, and he was liberated without notice to the defendants. The property which was taken as a substitute for the bail, might not have been all that he possessed; it did not appear that it was. More might have been discovered by the sureties, and better sales might have been made under their management of that which was discovered. It was inequitable in the commissioners to rely upon their ultimate security in the defendants' bond to such an extent, as not to consult them as to the intermediate steps with the principal before the sureties were called upon. Under these circumstances the court will not set aside a second verdict. It is a general rule, that if a new trial has been granted, and there be a verdict for the same party in whose favour the verdict upon the first trial was given, the court will not grant a third trial; 6 *Bac.* 658.; unless some unfair practice were used in obtaining it, 6 *Mod.* 22. *Anon.*, or the jury have been guilty of misbehaviour. And this doctrine was adopted by the court in *The Lessee of Willis* v. *Bucher*, (*d*) where the chief justice says, that had the case gone to the jury in the manner in which by law it ought to have been submitted to them, he should have been against a new trial. It ought to be a very extraordinary case in which two concurring verdicts are disturbed.

TILGHMAN C. J. The defendants' counsel founded his argument against granting a new trial on three points. 1st,

(*a*) 2 *Wils.* 307.
(*b*) 1 *Vern.* 196.
(*c*) 2 *Vern.* 393.
(*d*) 2 *Binn.* 467.

That it was a hard case. 2d, That the verdict was agreeable to the law. 3d, That there have been two verdicts for the defendants.

1. Not much need be said on the first point. There is no more hardship in this case, than in cases in general where a surety has to pay money. It is unfortunate, that a man should be obliged to pay for the default of his friend, and in that sense it may be said to be hard; but it would be much harder if the rules of property should be set aside, because the loss is to fall on the *sureties*, upon whose credit the principal was trusted in the beginning.

2. The defendants contend that they were injured by the conduct of the plaintiffs in the action brought against *Osburn*. If so, they ought not to be liable to this action; for the law certainly is, that if the obligee undertakes to discharge the principal, or in any considerable degree to lessen his responsibility, without consulting the surety, he ought not to be permitted to demand payment of the surety. But how is the fact? The plaintiffs did not discharge *Osburn*, they only accepted his appearance without bail; and in consideration of this, they obtained an assignment of all his property, which they sold to the best advantage, thereby lessening the sum for which the defendants were responsible. If instead of assigning to the plaintiffs, he had gone to jail, and been discharged by the insolvent act, his property would have been *divided* among his creditors. So that in fact, the plaintiffs, by accepting the appearance of *Osburn* without bail, did a considerable service to the defendants. To say that this should discharge the defendants from all responsibility, would be equally contrary to justice and equity. It would be a most ungrateful return to a substantial benefit. No authority has been cited or can be shewn to support such a principle.

3. It was said by me in *Willis's Lessee* v. *Bucher*, 2 *Binney* 467., that it must be a very extraordinary case in which a new trial ought to be granted, after two concurring verdicts on matters of *fact*. I adhere to that sentiment, but it has no bearing on the case before us. Here is no dispute about facts. There was no discordance or difficulty in the evidence; but two juries have differed from the court, in the law resulting

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from the facts. It is said by all the court, in the case of *Goodwin* v. *Gibbons*, 4 *Burr.* 2108, that there is no rule of law against granting a new trial after *two verdicts*. If there was such a rule, there would no longer be any certainty in the law. Principles the most firmly established might be overturned, because a second jury were obstinate and rash enough to persevere in the errors of the first, in a matter, confessed by all to be properly within the jurisdiction of the court; I mean the construction of the law arising from undisputed facts. This is a state of things, which no man would wish to see. I believe that in this instance the two juries have erred from a principle of humanity. On one side they saw a rich county, to whom the object of dispute, though in itself considerable, was not of much moment. On the other a few unfortunate individuals exposed to ruin. If none but the parties to this suit were to be affected by the verdict, those benevolent feelings might be safely indulged. But when it is reflected, that a precedent is about to be set, which may have a pernicious effect on those regulations, on which the peace and security of the country depend, I feel it a duty incumbent on this court, to submit the matter to the deliberate consideration of another jury.

YEATES J. The plaintiff's motion for a new trial rests on the grounds of the verdict in the Circuit Court being contrary to evidence, the law, and the charge of the court. Against the motion it is objected, that upon the face of the model of the bridge referred to in the argument, it would be absolutely impossible to build such a bridge, so as to insure its duration for seven years. Admit the fact to be so, which is at least problematical, I do not see how this circumstance can affect the present case. The law is clearly settled, that if the condition of a bond &c. be impossible at the time of making the condition, the obligation &c. is single. It is illustrated by an example. If a man be bound in an obligation &c. with condition, that if the obligor do go from the church of *St. Peter* in *Westminster* to the church of *St. Peter* in *Rome* within three hours, then the obligation to be void, the condition is void and impossible, and the obligation standeth good. *Co. Litt.* 206. *a. b.*

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It is also objected, that the discharge of the principal *Obadiah Osburn* from the arrest in the suit brought against him by the plaintiffs in *Berks* county, and accepting his appearance in that action, amounted to a release of his sureties. No authority has been shewn in support of this position. On the contrary it is evident, that the obtaining a release from *Osburn* of all his property real and personal, disposing of it to the best advantage, and giving his sureties credit for the amount, was highly beneficial to them.

But it is said, that a new trial will not be granted in a *hard* action. The cases cited are of suits brought for negligently keeping a fire, whereby the plaintiff's house was burnt, malicious prosecution for bringing a suit in an inferior court, and where a woman of quality living in *England* as a *feme sole*, set up her marriage in a foreign country, to avoid the payment of her just debts. *Farewell* v. *Chaffey et al.*, 1 *Burr.* 54. Lord *Mansfield* reviews the cases on this branch of the law, and says, the verdicts therein were against evidence and the strict rule of law, or obtained through surprise; but the court would not give a second chance of success to a hard action, or an unconscionable defence. A new trial ought to be granted to attain real justice; but not to gratify litigious passions upon every point of *summum jus*. It is true, that in common language, where a surety is obliged to pay the debt of his principal, we attribute *hardship* to the case; but this does not hold in a legal sense. Where one man becomes security for the debt or engagement of another, he substitutes himself in his place; he makes the debt or engagement his own upon the default of the principal, in every event which falls within the true meaning of his undertaking. In this instance, the commissioners of *Berks* county entered into the contract with *Osburn*, on the defendants' becoming his sureties, that he should fairly perform the stipulations on his part. Relying on the security thus given, they have advanced to him the large sum of 9596 dollars and 66 cents; but the bridge remains unbuilt, and the agreement has been violated. Every principle of honesty and moral obligation enjoins on the defendants the duties of making full compensation to the plaintiffs for the injury they have sustained by the nonperformance of the contract. It would be glaring in-

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justice, to suffer the defendants to shelter themselves under the pretext of hardship, from doing an act, which they have stipulated to perform by their solemn deed. If it was impracticable to build the bridge, according to the plan proposed by *Osburn*, they were bound to see to it in the first instance, before they executed the instrument. By becoming coobligors in the bond, they adopt the model, as if made by themselves, and are responsible for all the consequences. It will not be pretended that this is a case of small value, where the play is not worth the candle.

But it has been strongly relied on, that a new trial has already been granted; and that a second verdict having gone the same way, a third trial will not be granted, unless upon the particular circumstances of a case, as where the second verdict has been obtained by any bad practice, 6 *Mod.* 22. I accede to this doctrine, when restricted to damages found by a second set of jurors on a mere matter of fact, and the case of *Chambers* v. *Robinson*, 1 *Stra.* 691., warrants the position with that limitation. There, in an action for a malicious prosecution for perjury, wherein the indictment stated the perjury so incorrectly, that the then defendant could not have been convicted thereon, there was a recovery of 1000*l.* damages, and a new trial was granted upon payment of costs. A new trial was had, and the same damages were given again. The defendant applied to the court for a third trial; but the court said it was not in their power to grant it, and cited *Clerk* v. *Udall*, 2 *Salk.* 649., where the same doctrine obtained. In that case, the Chief Justice is reported to have said, that where upon a second trial the jury had doubled the damages, a new trial should be granted. This appears to me to accord with the true spirit of our system of jurisprudence. The jurors judge of facts, but the court necessarily to effectuate the object of their sitting, have a superintending power over verdicts, and where they are plainly against the great weight of evidence, will award a new trial, though there should be a contrariety of evidence. In the language of the Chief Justice in *Willis's Lessee* v. *Bucher*, 2 *Binn.* 467., "it "must be a very extraordinary case indeed, in which I could "be induced to give my opinion for a new trial, after two "verdicts on matters of fact." Where facts are disputed,

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and have undergone a thorough investigation by two sets of jurors, who have found in the same way, it would be an usurpation of the rights of juries on the part of the court, to annul what they have done. Here there is no such contest. The amount of the money paid to *Osburn*, and the sum arising from the sale of his property, are admitted. It is not pretended, that there is any ambiguity in the wording of the obligation executed by the defendants, or that *Osburn* has performed his agreement. Whether the accepting the appearance of *Osburn* in the action in *Berks* county, and applying the full amount of sales to the credit of his sureties, operates as a discharge of the defendants from their responsibility, can only be considered as mere matter of law, concerning which there can be no difficulty whatever. The question then before us is reduced to a single point. Are the court bound by any imperious rule of law to give their sanction to a second verdict manifestly against the justice of the case, the evidence, the law, and the charge of the court? The unanimous opinion of all the judges of the King's Bench in *Goodwin* v. *Gibbons*, 4 *Burr.* 2108., delivered in 1767, affords a ready answer to the question. "There is no such general rule. A new trial must depend "upon answering the ends of justice." I am much gratified by finding that the judges of the Superior Court of the state of *South Carolina* have adopted the same doctrine in *Moore's Admrs.* v. *Cherry*, 1 *Bay.* 269., and will content myself with expressing my entire concurrence with the opinions of *Waties* and *Bay* justices, as detailed in that report.

My opinion on the whole matter is, that the judgment of the Circuit Court be reversed, and that the record be remitted to the court of Common Pleas of *York* county for a new trial.

New trial awarded.

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Lancaster, Saturday, May 25.

EBERSOLL *against* KRUG and Wife.

IN ERROR.

An award of arbitrators in the Common Pleas is to be considered as a judgment of that court from the time of its entry upon the docket, and as such subject to a writ of error.

THIS was an action of slander in the Common Pleas of *Dauphin*, which was referred to arbitrators under the act of 29th *March* 1809. The arbitrators filed their award in the office of the prothonotary on the 26th *January* 1810, finding *twenty dollars* damages in favour of *Krug* and wife the plaintiffs below, and on the same day the prothonotary, in conformity with the tenth section of the act, 9 *St. Laws* 128., made an entry of the award on his docket, and added these words, "*judgment according to act of assembly.*" The present writ of error was then brought, which

Laird for the defendants in error now moved to quash, upon the ground that in fact the Common Pleas had not rendered, and were not by the act of assembly authorized to render, any judgment in the case, the award having the character and effect of a judgment only as to lien, and nothing more. And he went into an examination of the various provisions of the law to support his point.

Hopkins for the plaintiff in error, answered that the award was uniformly spoken of through the act as a judgment, execution was directed to issue upon it, and a stay of execution was given in certain cases where it had been entered, calling it by the express name of a judgment, as in the eleventh section. He also argued that unless it was a judgment of the Common Pleas, and as such liable to their control, an infinite variety of evils might arise from awards, which at present were not contemplated.

The motion was made and argued at *May* term 1810, and held under advisement until this day, when the judges delivered their opinions.

TILGHMAN C. J. The defendant in error has moved to quash the writ of error in this case, and he contends that

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no judgment has been rendered, and therefore no writ of error lies. An award of arbitrators was made and returned to the prothonotary's office, in pursuance of the act of 29th *March* 1809, and the prothonotary made the following entry on his docket, "judgment according to act of assembly." The defendant in error supposes, that the prothonotary had no right to make such an entry; that although the report, when filed, was a lien on the defendant's lands, yet it was not a judgment; that the only relief against the award was by an appeal, and that the appeal not having been made in due time, the party complaining is without remedy.

I am not ambitious of extending the jurisdiction of this court, beyond the limits intended by the legislature; but where it has jurisdiction we are bound to support it. It appears to me, that although the act of assembly is not without difficulty, yet on the whole the intention is, that the award when entered in the docket of the prothonotary, shall be considered as a judgment. The expressions towards the end of the tenth section are, that from the time of the entry in the docket, *it shall rank as a judgment*. The eleventh section is stronger. The prothonotary is directed "to issue an "execution or such other process as may be necessary to "carry into complete effect and operation, *such judgment ob-* "*tained as aforesaid*. Provided always, that when *judgment* "*has been rendered* for any sum or sums of money, the like "stay of execution shall be had, and under the like regula- "tions, as is provided by the seventh section of the act to "which this is a supplement." Now when the legislature expressly and repeatedly say, that it is a judgment, why should we say that it is not? Will any ill consequence arise from considering it as a judgment? No, but the very reverse. For if it is not a judgment of the court of Common Pleas, they can have no control over it, or over the execution issued on it. Suppose then, that the party who has obtained an award, should be guilty of gross oppression in taking out his execution, or that he should not have made the entry of the award agreeably to law; what is to be done? If it is the judgment of the court of Common Pleas, they may interfere in a summary way, and do justice. But if they have no authority, the injured party has no remedy but by action;

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and in the mean while he may lie in prison, or be ruined by the sheriff's sale of his property. Plausible objections may be raised, by considering particular parts of the act detached from the rest. But this is not fair. To come at the true meaning, we must consider the whole.

I am of opinion, that taking into view the whole scope of the act, the award is to be considered as the judgment of the court of Common Pleas, from the time of its entry on the docket. That being the case, a writ of error lies to this court.

YEATES J. The motion to dismiss this writ of error is founded on the assumption of a principle, that the only remedy allowed to a party, against whom a judgment has been entered by a prothonotary founded on the award of arbitrators, under the "act supplementary to an act intitled an "act to regulate arbitrations and proceedings in courts of "justice," is by appeal to the court of Common Pleas of the proper county. 9 *St. Laws* 128. 511.

It has been contended that this law, authorizing the arbitrators on their oaths and affirmations justly and equitably to try all matters in variance submitted to them, constitutes them exclusive judges of the law and fact, in all cases where there are no appeals, and that in this mode only can their proceedings be reexamined.

We cannot suppose that the legislature intended to take away the powers of this court, unless they have so expressed themselves, or it can be inferred by necessary implication. By an old act of assembly passed 22d *May* 1722, 1 *Dall. St. Laws* 179. *sec.* 11., the justices of this court are authorized to issue forth writs of error; and in sect. 13. it is provided, that "they generally shall minister justice to "all persons, and exercise the jurisdictions and powers "thereby granted, concerning all and singular the premises, "according to law, as fully and amply, to all intents and pur"poses whatsoever, as the justices of the court of King's "Bench, Common Pleas, and Exchequer at *Westminster*, or "any of them may or can do." And these general powers are confirmed to them by an act passed 13th *April* 1791, 3 *Dall. St. Laws* 92. *s.* 1., "consistently with the provisions

"made in and by the constitution of this state." It is fully settled that the jurisdiction of the court of King's Bench is not ousted unless by express words. 2 *Burr.* 1040., 3 *Burr.* 1458., 5 *Burr.* 2594., 2 *Stra.* 1209. So far has this doctrine been carried, that the judges of the Supreme Court of *New York* have decided, that they had jurisdiction, and might grant a *certiorari* to remove into that court the proceedings of the court of Common Pleas on an appeal to them from the commissioners of the highways, though their statute of the 8th *April* 1801 declared, the decision of the judges of the Common Pleas on an appeal made to them in such cases, to be conclusive. 2 *Caines* 182. A variety of cases may be put, to shew the absolute necessity of this court's exercising a superintending power to correct the errors of other courts.

The question before us must be determined as the law stood in *February* 1810, when this writ of error was sued out. On the minutest examination of the original arbitration act passed 21st *March* 1806, 7 *St. Laws* 558., its first supplement of the 13th *April* 1807, 8 *St. Laws* 296., its second supplement of the 28th *March* 1808, *Ib.* 168., and the last supplement of the 29th *March* 1809, 9 *St. Laws* 125., I can find nothing which ousts this court of jurisdiction. It is true, the eleventh section of the last supplement gives an appeal to either party to the court of Common Pleas of the proper county, within fifteen days after the entry of the award of arbitrators on the docket of the prothonotary; but this provision is not inconsistent with the controlling power of this court. This act is no longer in force, it having been supplied and altered by the act regulating arbitrations, passed on the 20th *March* 1810, 9 *St. Laws* 145. But neither does this last mentioned law take away the power of this court to issue writs of error in instances like the present. A writ of error on the principles of the common law, is grantable in all civil cases, *ex debito justitiæ*. 2 *Salk.* 504. In such actions it is justly deemed a writ of right. 1 *Stra.* 565. But it has been justly admitted by the counsel of the plaintiff in error, that consistently with the provisions of the arbitration system, the writ could not be sued out during the period allowed for the appeal; because such a procedure would deprive the adverse party of a privilege allowed him by the law.

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The award of the arbitrators ranks as a judgment under the tenth section of the act of 29th *March* 1809, from the time of its being entered on the docket of the prothonotary; but where it is afterwards reversed either on an appeal or writ of error, its lien as a judgment becomes thereby determined, and ceases.

The present question has in fact been determined at the last *September* term for the Southern District. On a writ of error issued to the Common Pleas of *Bedford* county, in a case wherein *John Moore* esquire was plaintiff below, and *Jacob*, *John* and *Abraham Studebacker* were defendants, it appeared on the face of the proceedings, that a father had submitted the cause of himself and his two sons to arbitration, and the arbitrators awarded 45 dollars against the defendants; and this court on full argument reversed the judgment entered thereon, and all proceedings under it, on the ground that two of the defendants below did not join in the reference, nor were served with notice of the award. Another point was also made by the counsel of the plaintiffs in error, which the court deemed unnecessary to decide; viz. that the suit having been in court prior to the reference, the submission should have been made a rule of court, under the second section of the act of 21st *March* 1806. I am clearly satisfied that a defendant may avail himself of real and substantial errors apparent on the record of a submission and award, by writ of error in the court, though no appeal has been brought; that there are neither clear and explicit words, nor any necessary implication, which arises on any part of the law cited, to take away the jurisdiction of the court in the premises, and that therefore the motion made by the counsel for the defendants in error be denied.

BRACKENRIDGE J. concurred with the Chief Justice.

Motion denied.

3b 533
4r 465

SPANGLER *against* the COMMONWEALTH.

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Lancaster, Saturday, May 25.

IN ERROR.

An indictment for stealing bank notes generally, under the description of promissory notes for the payment of money, is bad. It should appear on the face of the indictment that they are bank notes of some *incorporated* bank, or in some way that they are lawful notes; no unincorporated bank notes in *Pennsylvania* being at present the subject of larceny.

THE plaintiff in error was indicted in the Quarter Sessions of *Dauphin* in *February* last, for feloniously stealing on the 22d *January* 1811 "three several promissory "notes for the payment of money, viz. three bank notes, "each for the payment of five dollars, of the value each of "five dollars lawful money of the *United States*, and a pro- "missory note for the payment of money, viz. a bank note "for the payment of ten dollars like lawful money, of the "property of *William Graydon* esquire."

After conviction, the record was removed to this court by writ of error, where several reasons were urged for reversing the judgment; but the only one upon which the court gave any opinion, was this, that the indictment did not point out the bank or banks which issued the notes supposed to have been stolen, and consequently the charge was destitute of legal precision and certainty.

Elder and *Hopkins* for the plaintiff in error. No indictment can be good which wants certainty as to the thing wherein the offence was committed. Hence an indictment for forging a lease of *certain lands*, or for stealing the goods and chattels of *J. S.*, 4 *Hawk. P. C.* 41. *bk.* 2. *c.* 25. *sec.* 74., or for speaking divers false and scandalous words against *P. Q.*, being mayor of such a place, *Id. sec.* 59., is bad. It ought precisely to appear what the thing stolen is. *Commonwealth* v. *Boyer* (*a*), 2 *East Cr. Law* 601. *Davy* v. *Baker* (*b*), *Rex* v. *Robe* (*c*), 3 *Bac.* 555., *Indictment G.* Otherwise a man may be twice indicted for the same felony. But there is a still more solid reason for the objection here. It should appear that the notes were issued by an *incorporated* bank, for a felony cannot be committed in the taking of any other bank notes. It is questionable whether before the act of 30th *January* 1810, 9 *St. Laws* 15, bank notes were included

(*a*) 1 *Binn.* 201. (*b*) 4 *Burr.* 2471. (*c*) 2 *Stra.* 999.

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within the description in the act of 15th *April* 1790, "promissory notes for the payment of money." The legislature appear to have thought not, by declaring in the late act, that the robbery or larceny of any bank note of any *incorporated* bank shall be punishable in the same manner as the robbery or larceny of any goods or chattels. It is a declaration that before that such a robbery was not so punishable; or at least it is a virtual repeal of the act of 1790 so far as it respects all bank notes. The law is intitled "an act to *amend* the "penal laws;" and no doubt the legislature intended to put down unincorporated banks, by affording a distinct security to the notes of banks which had been incorporated. In the same session, they made it unlawful for any person to offer or to accept in payment the notes of an unincorporated bank; *Act of* 19*th March* 1810, 9 *St. Laws* 87; of course in contemplation of law such notes are without value, and therefore not a subject of property and of larceny. It does not appear that the notes in question were not of this description.

Jenkins and *Ellmaker* for the Commonwealth. It is not intended to support this indictment under the act of 30th *January* 1810, but under that of 15th *April* 1790. The notes stolen are described as promissory notes for the payment of money, to wit, bank notes, the amounts of which are set out. It has never been supposed heretofore that bank notes were not promissory notes for the payment of money. Such an objection was not started in *The Commonwealth* v. *Boyer*, and many convictions have taken place for that offence. The present notes could not have been such as it was unlawful to take, and therefore of no value, because the indictment sets forth that each five dollar note was of the value of five dollars. The value was a mixt question of law and of fact, which has been ascertained by the conviction; and by being so ascertained, it follows they were not the notes of an unincorporated bank. It is however not to be presumed that the legislature intended to repeal any part of the act of 1790, but merely that the true construction was not given to that act. The late act has not either negative or repealing words; and the intention of putting down private banks by

means of it, cannot be attributed to the legislature, because the act for that purpose did not pass until two months afterwards.

TILGHMAN C. J. This is a writ of error to the court of Quarter Sessions of *Dauphin* county, where judgment was given against *Eve Spangler* on an indictment for stealing four bank notes.

The plaintiff in error has made several points concerning the jurisdiction of the court of Quarter Sessions, and the process for summoning the jury, on which I shall give no opinion. It will be sufficient to consider the exceptions to the indictment. *Eve Spangler* is charged with stealing "three several promissory notes for the payment of money, "viz. three bank notes, each for the payment of five dollars, "of the value each of five dollars lawful money of the *United States*, and a promissory note for the payment of money, viz. a bank note for the payment of ten dollars, of the "value of ten dollars like lawful money, the property of "*William Graydon* esq."

The indictment is founded on the act of 5th *April* 1790; by the fifth section of which it is enacted, that robbery or larceny of "promissory notes for the payment of money," shall be punished in the same manner as robbery or larceny of any goods or chattels. I will not say whether the indictment might not have been supported, if the case had turned entirely on the act which has been mentioned. But it is necessary to take other acts into consideration. By the "act "to amend the penal laws," 30th *January* 1810, it is enacted, that robbery or larceny of any bank note or bank notes of any *incorporated bank*, shall be punished in the same manner as the robbery or larceny of any goods or chattels of equal amount. Whether the legislature considered bank notes as included in the terms "promissory notes for the "payment of money" in the act of 5th *April* 1790, is not certain. The "act to amend the penal laws" contains no express repeal of any part of the act of 5th *April* 1790; yet when larceny of the notes of *incorporated* banks is made punishable, one cannot help supposing that it was intended the notes of *unincorporated* banks should not be the subject of larceny. It is evident that in the year 1810 it was the ob-

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ject of the legislature to suppress all unincorporated banks. This appears, not only from the act just mentioned, but still more clearly from another act passed the same session, 19th *March* 1810, which bears strongly on the case before the court. By the first section of this last act, it is made unlawful, after 1st *May* 1810, for any association of persons, who at the time of passing the act were, or thereafter should be connected for the purpose of banking, and who were not *incorporated by law*, to make, utter or issue, any bills or notes in the nature of bank notes, payable to bearer, or order, or otherwise. The third section declares it to be unlawful for any person "to offer or accept in payment, any note is-"sued from any unincorporated bank, knowing it to be "such." The fourth section contains a proviso, that "nothing "contained in the act, should be construed so as to dis-"charge any person or persons, or any association of per-"sons, who might before the passing of the act have become "engaged for the payment of any sum of money, from such "engagements." Suppose now that a person should have knowingly received a note issued contrary to this law, and the bank had refused payment, no action would lie on it, because the courts of the commonwealth would not suffer themselves to be instrumental in inforcing the execution of an unlawful contract. This principle has been established in the cases of *Anthony's Exrs.* v. *Coulon*, and *Mitchell* v. *Smith*, both decided in this court. There may be bank notes therefore, which are of no value or validity in law, and consequently cannot be the subject of larceny. For although bank notes are "promissory notes for the payment of money," within the meaning of the act of 5th *April* 1790, yet that act cannot be construed so as to afford protection to notes unlawfully issued, and unlawfully received. That being the case, it is necessary that an indictment for stealing bank notes, should either aver in general, that they were issued by a bank incorporated by law, or name the bank and aver that it was incorporated, or shew in some sufficient manner that the notes were lawful. If this is not done, judgment cannot be entered, because it cannot appear to the court that any offence has been committed.

Inasmuch then as this indictment is expressly for stealing

bank notes, and does not shew that they were lawful notes, I am of opinion that the judgment of the court of Quarter Sessions was erroneous.

YEATES J. It is certainly the duty of the court to pursue a middle line between the great mass of the community on the one hand, and individuals charged with offences on the other hand. Where an indictment states a criminal charge with sufficient certainty, so that the party may be fully informed thereby of the facts he is called upon to answer, and prepare for his defence, it is disreputable to the administration of the law that he should be suffered to escape with impunity for a mere slip of form, totally unconnected with the merits of the case. At the same time we well know, that too great a laxity in matters of this nature, will lead to consequences dangerous to innocence. To preserve uniformity of decisions we are necessarily obliged to follow precedents; the utmost uncertainty would ensue from our disregarding them.

I do not feel the force of the exception taken to this indictment, on account of the omission of the bank or banks which issued the notes in question. The description of the notes is more precise and particular, than if the subject matter of the charge had been a bay horse or a piece of linen, stating the price and value, which would unquestionably be good. I deem it unnecessary however to give a decided opinion on this point. But it is perfectly clear that the crime must be so stated, as that the court should be at no loss or difficulty when called upon to pronounce sentence upon a conviction. It must be laid in the words of the act of assembly creating the offence, or at least in language plainly equipollent. Nothing can be taken by intendment.

Bank and promissory notes are mere choses in action; at common law they could not be stolen. But by the fifth section of our statute of the 5th *April* 1790 it is provided, that robbery or larceny of promissory notes for the payment of money, shall be punished in the same manner as robbery or larceny of any goods or chattels. This provision has undergone some modification from the words used in the act of 30th *January* 1810, that from and after the passage of that

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law, the robbery or larceny of any bank note or bank notes of any *incorporated bank*, should be punishable in the same manner as the robbery or larceny of any goods or chattels of equal amount. A subsequent law passed on the 19th *March* 1810 has declared, that from and after the first day of *May* then next, it shall be *unlawful* for any association of persons, who now are or hereafter may be connected for the purpose of banking, and who are not incorporated by law, to make, utter, or issue any bills or notes in the nature of bank notes payable to bearer, or order, or otherwise &c. By the legislature's making such notes, issued after the 1st *May* 1810, *unlawful*, they necessarily withdraw from them the general protection first afforded them by the former law of 5th *April* 1790. The day of the commission of this larceny is laid in the indictment to be on the 22d *January* 1811. Now may not the notes stolen have been issued by an unincorporated bank after the 1st day of *May* 1810? Nothing appears in the indictment, from which we can with certainty pronounce that the perpetrator of the offence was obnoxious to the punishment of a felony. And if by any possibility such judgment could not be rendered consistently with law, it is out of our power to affirm it. Though the facts stated in the indictment may be true, yet if they do not necessarily and unequivocally describe the offence of which the prisoner stands charged in a legal sense, such indictment is defective.

We may be led from our sense of justice to regret the event of this prosecution; but we should carry in our minds the observation of lord *Mansfield* in *Rex* v. *Boyce*, 4 *Burr.* 2082. "Tenderness ought always to prevail in criminal "cases, so far at least as to take care, that a man may not suf- "fer otherwise than by due course of law, nor have any hard- "ship done him, or severity exercised upon him, where the "construction may admit of a reasonable doubt or difficulty." And again in *Rex* v. *Wilkes*, 4 *Burr.* 2552. "The court is "bound to pronounce the law, as they think it is, al- "ways leaning to the favourable side where they doubt: for "so says the law." I deem it unnecessary to give an opinion on any of the other exceptions taken to the record in this cause. I have no doubt whatever that this indictment can-

not support the judgment rendered thereon, and am therefore constrained to say that the judgment must be reversed.

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BRACKENRIDGE J. expressed his concurrence.

Judgment reversed.

3b 539
5b 352
15s 217
7w 334
6 370
9 408
72 109

The Commissioners of BERKS County Assignees of OSBURN *against* ROSS.

Lancaster, Saturday, May 25.

A deposition taken before a person who is actually a justice of the peace, though he is not so described in the writing, is good. A magistrate cannot devest himself of his judicial capacity to administer an oath, while his commission is in force; and therefore whenever he administers an oath, it shall be taken to have been done judicially. Notice of an account or debt intended to be defalked is not necessary where the defalcation has been pleaded specially. The rule applies only to cases where the defendant pleads the general issue. Where an account stated, deed, or document, is offered in evidence to the jury, the court may either decide themselves that it is or is not sufficiently proved, and admit or reject it accordingly, or they may refer the evidence to the jury, instructing them to disregard the deed &c., unless they are satisfied with the proof of its execution.

UPON an appeal from the decision of *Brackenridge* J. at a Circuit Court for *York* in *May* 1809, the case was thus:

It was an action of debt on a bond dated the 8th *Nov.* 1802, by *Ross* to *Osburn*, who had assigned it to the plaintiffs on the 22d *June* 1804, and the pleas were payment with leave, and a defalcation, to which the plaintiffs replied *non solvit*, and no defalcation.

On the trial of the cause, the defendant offered in evidence the deposition of *Obadiah Underwood*, taken under a rule of court which authorized depositions to be taken before a justice of the peace of *Washington* county; producing at the same time a certificate of the prothonotary of *Washington* county, that *William Meetkirke* before whom the deposition had been taken, was a justice of the peace for that county. But the plaintiffs objected, because the deposition did not state, nor did it appear any where on the face of it, that *Meetkirke* was a justice. His honour overruled the objection.

Another objection was taken to a part of the deposition, because it contained evidence of a settlement between *Osburn* and *Ross*, by which it appeared that *Osburn* was indebted to the defendant after crediting the amount due on the bond; but it did not distinctly appear whether this set-

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tlement was before or after the assignment. Judge *Brackenridge* suffered the part in question to be read, at the same time instructing the jury, that unless they could fairly collect from the deposition that the settlement was before the assignment, they should disregard it altogether.

The jury found a verdict for the defendant, which the judge refused to set aside, and the plaintiffs appealed.

Hopkins for the appellants. There are three objections to the deposition of *Underwood*. 1. It is not stated on the face of the deposition that *Meetkirke*, before whom the deposition was taken, was a justice of *Washington* county. 2. The deposition proves matter of defalcation of which no notice was given, according to rule 28th of the Circuit Court. 3. It does not appear that the settlement between *Osburn* and *Ross* was made before the assignment of the bond.

1. As the official character of *Meetkirke* does not appear in the deposition, the court must suppose that he acted in his private capacity. The acts of such magistrates are construed strictly, and unless the judicial character appears, the proceeding is *coram non judice*.

2. [Upon examining the record this point was given up; the rule applying only to cases where the general issue is pleaded.]

3. The deposition speaks of declarations of *Osburn* in the spring of 1804 or 1805, relative to the settlement. If in 1804, they were evidence; if in 1805, they were not. The very circumstance then which made this part of the deposition evidence, was the time to which it referred, and it was not evidence unless distinctly proved. The judge therefore erred in leaving that point to the jury, because the deposition ought not to have gone to the jury, till that point was settled.

Bowie for the defendant. The first exception is rather a nice one. It cannot be denied that *Meetkirke* was a justice, but the deposition is supposed to be bad, because he does not call himself so. Provided we have the substance, the form is immaterial. All that is important is his power to administer an oath; and he could not devest himself of that,

in whatever character he acted, while his commission was in force.

As to the other objection, it is in collision with the almost universal practice. If a judge is not satisfied with the proof of a deed offered in evidence, either from the character of the witness or any other circumstance, he may admit it, referring the proof to the jury. It was entirely a question of fact, whether the declarations were before or after the assignment, and it was properly left to the jury to decide. The judge is satisfied with the verdict, and there is no doubt that justice has been done.

TILGHMAN C. J. This action was brought on a bond of the defendant to *Obadiah Osburn*, dated 8th *November* 1802, and assigned by *Osburn* to the plaintiffs 22d *June* 1804.

On the trial in the Circuit Court, the deposition of *Obadiah Underwood* was produced as evidence on behalf of the defendant, and admitted by the court, although objected to by the counsel for the plaintiffs. Whether it was legal evidence is the question.

Two reasons have been urged in support of the objection to the evidence. 1. That the person before whom the deposition was taken, does not style himself a justice of the peace. 2. That the deposition contains evidence of a settlement of accounts between *Osburn* and the defendant, by which it appeared that *Osburn* was indebted to the defendant in the sum of 20 dollars, after crediting the amount due to *Osburn* on the bond; but it did not clearly appear, whether this settlement was previous to the assignment of the bond to the plaintiffs.

1. Although *Wm. Meetkirke*, before whom the deposition was taken in the county of *Washington*, does not style himself a justice of the peace, yet it was proved that he was a justice, by a certificate of the prothonotary of the court of Common Pleas of that county. Whether he called himself a justice or not, is not material, as there is satisfactory evidence that he was a justice. We are not to construe this transaction with the same strictness, as if we were examining a record of a conviction by a justice of the peace under a penal statute. In such a case, it might be necessary that

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his authority should appear on the face of the record, because the sufficiency of the conviction must be tried *by the record*. But where a rule of court is made, to take depositions before a justice of the peace, the object of the rule is obtained, if the deposition is in fact taken before a justice; and if that fact is questioned, the court who made the rule will take care to be satisfied of it, before they suffer the deposition to be read. In the present instance, they had convincing testimony. The official certificate of the prothonotary is stronger evidence, than the assertion of the justice himself. But it is said, that not having called himself a justice, he acted not in his official but in a private capacity. The answer to this objection is plain. The taking of the deposition is in its nature an official act, and as long as the commission of the justice was in force, he possessed an authority to administer oaths, of which he could not devest himself.

2. That part of the deposition which relates to the settlement between *Osburn* and the defendant, was admitted specially. The judge told the jury he left it to them to decide, whether the settlement was *before* or *after* the assignment of the bond. Of this they were to judge from the whole of the deposition; and if they should think that the settlement was *subsequent* to the assignment, they were to pay no regard to it. I cannot see why the deposition might not be admitted under this restriction. If it had appeared *clearly* to the *judge*, that the settlement was *subsequent* to the assignment, he ought not to have permitted it to go in evidence. But it was doubtful; he left it therefore to the jury to decide the previous point, on which the validity of the evidence turned. It is something analogous to the common case of a deed being offered in evidence, which is to be proved before it is read to the jury. The court if they please may decide whether it is sufficiently proved; but they may, and frequently do, leave it to the jury, to determine the sufficiency of the proof, and then the deed is read; but the jury are told, that they are not to consider it as of any validity, unless they are satisfied that it was executed by the party. In that case, as in this, there is a previous question, which at the discretion of the court may be either decided by themselves, or sub-

mitted to the jury. I am of opinion, that the deposition was legal evidence under the restriction with which it was admitted.

YEATES J. It has been objected by the plaintiffs' counsel, that the deposition of *Obadiah Underwood* was inadmissible in evidence, inasmuch as it does not appear in the body of it, that *William Meetkirke* esquire before whom the deposition was taken, was a justice of the peace of *Washington* county. It is certain that it would be more correct in point of form, if it had been so expressed in the instrument. But the question is whether the want of it be such a defect, as would prevent the reading of the deposition under the circumstances of this case?

The rule of court directs that the deposition be taken, and in pursuance thereof *Underwood* appeared on the 30th *April* 1808, and being duly sworn did depose and say, &c. He signs his name to the deposition, which was written on the same sheet of paper whereon the rule of court was certified by the clerk of the Circuit Court, to which are subjoined the words, "Sworn and subscribed, *Wm. Meetkirke;*" and on the same day a certificate is given by the prothonotary of the court of Common Pleas of *Washington* county, under his seal of office, that *Wm. Meetkirke* esquire was then a justice of the peace of the same county.

I well recollect that some years ago it was the usual practice to read depositions taken in other counties than where the trial was had, without the certificate of the prothonotary that the person who administered the oath, was a justice of the peace. It cannot however be denied, that in all cases the certificate of the prothonotary is much safer and superior evidence to rely on, as establishing the truth of that fact, than the words of the party himself styling himself a justice of the peace. No reasonable doubt can be entertained here, that *Meetkirke*, while doing those things which appertained to his official character, acted in his public capacity as a justice of the peace. A natural as well as necessary implication arises in my idea, that such was the case.

It has been further urged, that the notice of the matter intended to be insisted on by way of defalcation, was not

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sufficiently special to justify the reading of this deposition. Two acts of assembly exist in this state upon this subject. The first was the old act for defalcation passed in 1705. 1 *Dall. St. Laws* 65. The second is the act for the relief of insolvent debtors passed in 1730; *Ib.* 263.; under the tenth section whereof it is provided, that where there are mutual debts, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require; so as at the time of pleading the general issue, where any debt is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon such general issue. This section is copied almost *verbatim* from the *British* statute of 2 *Geo.* 2. *c.* 22. *s.* 13., 5 *Ruff. Stat.* 691. The twenty-eighth rule for regulating the practice of the Circuit Court directs, that where the defendant intends on the *general issue* to defalk his account against the plaintiff's demand or any part of it, he shall give notice thereof in writing at least ten days before the trial, and at the same time furnish him with a copy of the account which he intends to give in evidence and rely on. It has been said, that these notices of set-off should almost be as certain as declarations. *Espin. Dig.* 241. But this evidence was not offered under the general issue. For the defendant not only pleaded payment with leave &c., but also a defalcation, to which the plaintiffs replied no defalcation. He might have insisted on the plea's stating the defalcation more particularly, or at least on a copy of the items meant to be insisted on. But when he submitted to this general plea and took issue upon it, he clearly waived his right to a special notice.

Finally, it has been objected that what passed between *Osburn* and *Ross* respecting their settlement, as contained in the deposition, ought not to have been received in evidence, unless it had been *undeniably* established to the satisfaction of the judge, that this transaction preceded the assignment of the bond on the 22d *June* 1804. I think that fact may fairly be inferred from circumstances detailed in the deposition; but it is certain, that the agreement for building the

bridge was made in *August* 1801, that the defendant about that time provided tools for *Osburn* to carry on the work, and paid several debts for him, and that his black man assisted him in the labours of the bridge between one and two years. This work was wholly discontinued before the bond was assigned to the plaintiffs; and it was agreed in the first instance, that this account should be deducted from the bond. The different items subsisted and formed unquestionable subjects of defalcation against the plaintiffs as assignees; though it was equivocal on the face of the instrument, whether the actual settlement took place early in the spring of 1804 or of 1805. Judge *Brackenridge* admitted the deposition to go to the jury, after striking out such parts of it as were deemed improper, with this direction, that unless they could fairly draw the inference of fact from the deposition, that the matters objected to therein were prior in point of time to the assignment, they should not regard them as evidence in forming their verdict. He considered the deposition as subjected to the same rules, which would obtain if the witness had been orally examined.

The question then is, was this illegal? I apprehend not, and that the judge conformed to the correct law and practice in such cases. It will be admitted, that if these matters had been sworn to by the witness *viva voce* in court, that the direction would have been correct. How can it be varied by being reduced to writing? What was done or said would be proper or improper testimony, according to the real time when it took place. Suppose, in addition to the case cited by the Chief Justice, an action for goods sold, and the defendant sets up a receipt of the plaintiff or a supposed agent, for the whole, or part of the sum demanded. If it be fully established that the receipt is not genuine, or the agency be disproved, the court would feel no difficulty in rejecting the paper. But on the other hand, if either of these facts should be doubtful on the proof before the court, would it not be more safe and correct, and more congenial to the spirit of our judicial system, to submit the question to the decision of the jury, with proper instructions to them as to the operation of the law according to the truth of the fact as found by

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them? I have no hesitation in holding the affirmative answer, and that such has been the practice.

I am of opinion on the whole case, that its merits are clearly with the defendant, that justice has been done by the verdict, and that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

3o 546
2s 470

Lancaster, Saturday, May 25.

WALLIS *against* MEASE.

So long as wild bees remain in the tree where they have hived, notwithstanding the tree is upon the land of an individual, and he has confined them in it, they are not the subject of a felony; and therefore proof of their having been taken with their honey from such a tree by a third person, is not a justification of words imputing a felony to such third person.

After the words laid in the declaration are proved, the plaintiff may give in evidence other words, actionable in themselves, and spoken since the suit brought, to shew the malice of the defendant.

THIS was an appeal from the decision of Judge *Yeates* at a Circuit Court for *Dauphin* in *May* 1809.

It was an action of slander brought against *Mease* for saying of the plaintiff, "you are a damned thief, and I can prove "it;" to which the defendant pleaded "not guilty, with leave "to justify."

On the trial of the cause, after proof had been made of the words laid in the declaration, the judge, at the instance of the plaintiff's counsel, permitted evidence to be given by a witness, that in the autumn of 1803 she heard the defendant say "he had called the plaintiff a thief, and would prove it "before all the people of *Harrisburg*. He had stolen *Har*- "*man's* bottle." This action was brought to *March* term 1803, and the trial was on the 31st *May* 1809.

Under the plea of justification, some evidence was given to shew that the plaintiff had in the night time been concerned in taking a swarm of wild bees, together with their honey, from the top of a tree on the land of another man, who had confined them in their hive or *skep;* but his honour, in addition to the circumstance that he did not think there was proof of the plaintiff's participation in this act, charged the jury, that if they were satisfied it was the practice and usage in the county, for the person who discovered a bee tree on another man's land to take it without being considered as any more than a trespasser in cutting the tree, it ought to weigh greatly in favour of the plaintiff; his opinion of the law was, that such an act did not amount to a felony.

The jury found a verdict for the plaintiff, with forty dollars damages, which the judge refused to set aside, and the defendant appealed.

Hopkins for the appellant contended that the verdict was against the weight of evidence; but he principally insisted upon the error of the judge before whom the cause was tried, in permitting evidence to be given of actionable words after the suit brought, and in charging the jury that taking a swarm of bees from a tree on the land of another man, was not felony.

As to the first point, he said it was too plain for argument, that a cause of action subsequent to the suit, could not be given in evidence to support the suit; and it was as much an ingredient in the plaintiff's case that the defendant had spoken the words with *malice*, as that he had spoken them at all; of course it was as essential to prove malice in order to support the suit, as to prove the words; and hence, if the subsequent words were admitted to shew malice, it was in fact admitting a subsequent cause of action to support the suit. If these actionable words were to have any effect besides this, it was to inflame the verdict of the jury, which was as bad a ground for them as the other. In fact, the jury could not pay the least attention to them, without increasing the damages. That was the plaintiff's object no doubt. But can they be twice visited upon the plaintiff, in the present action, and in a subsequent one? In a subsequent one it is plain that upon general principles they may, because they are actionable in themselves, and are not charged in the present declaration. It ought to follow then as a general principle that they could not be used in this. There is however a particular reason why they ought not. These words, if spoken, were buried in oblivion by the act of limitations; the admission of them therefore was to allow the benefit of them indirectly, and to surprise the defendant, when directly and after notice they would have been barred by the statute. I admit that any thing may be given in evidence to aggravate the damages in trespass which will not of itself bear an action, although the old and by far the more reasonable rule, was otherwise; *Bull. N. P.* 89.; for why permit an act which is not an injury by itself, to receive the indemnity due to an injury, merely because another act by the same party

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was really injurious? But no decision goes the length of permitting the damages to be aggravated by acts which may be the foundation of another suit; and it does appear that such a doctrine might be the means of severe oppression upon defendants.

As to the felony, if the bees were reduced to the dominion of the owner of the land, they were as much the subject of property, and of course of felony, as if they had been lodged in an artificial hive. The tree was the property of that owner, and he confined the bees within it. They were under his dominion, and were unquestionably his property. The practice of the country was of no importance as to the question of law.

Fisher and *Laird* for the plaintiff. Except so far as relates to the distinction between words actionable and not actionable, the first point has been settled in *Geare* v. *Britton* (*a*), that after the plaintiff has proved the words as laid in the declaration, although he cannot give evidence of any loss not expressly laid, he may give evidence of other expressions made use of by the defendant, as a proof of his ill will towards him. The legitimate use of such evidence is not to swell the damages, because they must arise out of the particular injury in the suit; nor is it to support the action, by proving the words laid to have been malicious, in case their malignity does not appear from the manner and circumstances of speaking them; but it is to shew the general disposition of the defendant toward the plaintiff, and thus to rebut any presumption in favour of the former, from a supposition that he has spoken such or similar words but once. If however their use is to shew the malice of the words laid, it is a lawful use of them, because the malice of these words is to be proved by extrinsic circumstances which cannot be laid in the declaration; and when it is proved, the plaintiff obtains damages not for any thing in the circumstances which he has used as *proof* of malice in the words laid, but for the malice itself in the words laid, which is quite independent of the proof. As it is clear then that the damages are not to be affected by the evidence of subsequent

(*a*) *Bull. N. P.* 7.

words, of what importance is it whether those words are actionable or not, or whether they are barred by the statute or not? The opposite argument is founded in a misconception of the legal effect of such evidence. Damages ought not to be given for words not laid in the declaration; and therefore, when an action is brought for words which have been used in a prior action to shew ill will, the defendant will not be injured by being made to pay damages for them.

Bees are *ferœ naturœ*. If reclaimed and domesticated as they sometimes are, they are the subject of a qualified property, that is, so long as they remain with the person who hived them. But bees in the forests of our country, or in their original hive, are not the property of the man who owns the tree, more than any of the animals of the forest. It is the universal practice of the country to hunt them, and to take them wherever found in their wild state.

The cause was argued at *May* term 1810, and kept under advisement until this term, when the judges delivered their opinions.

TILGHMAN C. J. This is an action of slander for calling the plaintiff a thief. The defendant pleaded not guilty, with leave to justify. Two exceptions are taken to the opinion of the judge, before whom the cause was tried. In the first place he charged the jury, that the plaintiff could not be guilty of felony, by taking a swarm of bees and their honey from the tree of another man, which the owner of the tree had reduced to possession, by confining them while in the top of the tree.

I believe there is no instance of a man's being convicted of felony in *Pennsylvania* for an act of this kind. It is undoubtedly a wrong; but I am not for extending the law of felony farther than it has been carried, in a case which is not of an atrocious nature. The taking of *wild bees*, has been considered by the people of the country as a species of hunting. Bees are of a *wild nature;* and without deciding what the law might be, if they were removed from the tree, and secured in a hive, I am of opinion, that while they remain in the tree, they are not the subject of a felony. This wild nature remains unchanged, nor are they completely, and for any valuable purpose, reduced to possession.

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The second and more difficult question is, whether the judge was right, in permitting the plaintiff to give in evidence, other words than those laid in the declaration, actionable in themselves, and spoken since the suit was brought. It must be considered as settled, that the plaintiff after proving the words laid in the declaration, may give in evidence other words, *not actionable*, by way of shewing the malice of the defendant. If it were not so settled, I should very much doubt the propriety of such evidence, because it may take the defendant by surprise; nor does it seem clear, that the malice of the defendant's heart at the time of speaking the words for which the suit is brought, can be fairly inferred from words spoken at a subsequent time, no way relating to those which are the cause of action. But assuming it as I must do, as a principle, that subsequent words may be given in evidence, I can see no reason for a distinction between words actionable and not actionable, or between words spoken before suit brought, and words spoken after.

The subsequent words are received as evidence, only to shew the mind and intent of the defendant, when he spoke the words which are the cause of action; and the damages are or ought to be given solely on account of the words laid in the declaration. This should be explained to the jury by the judge who tried the cause; and if they do their duty, they will give no damages for any words but those in the declaration. In this point of view, it can make no manner of difference, whether the subsequent words are actionable or not, or at what time they were spoken, because no damages are given for them. I confess there is danger, that in fact the jury may not confine themselves to their true line of duty, and for that and the reasons I have given before, if I considered myself at liberty, I would reject all evidence of this nature. But holding myself bound by former decisions, I must say that the evidence in this case was properly admitted.

BRACKENRIDGE J. A principal ground for a new trial in this case is stated to be, that the judge charged the jury, that *if they were satisfied that it was usual in the country to suppose that the finder of a bee-tree might take the honey,*

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without being considered any thing more than a trespasser, it would weigh in favour of the plaintiff. It is impossible to say that it would not weigh, if this way of thinking was correct. For in that case, it would be but an understanding of what was law. But it could weigh only in a moral point of view, and raise a presumption that he did not mean to commit a felony, or think that he was committing one. The popular understanding could only go to the *quo animo* with which he did the act. For a man committing *a trespass*, which in the popular opinion, and in his own, was a felony, might not be intitled to the same damages on being charged with felony, with one who thought it only a trespass as it really was. But if the taking the honey was actually a felony, the thinking it otherwise could not reduce it from a felony, and make it only a trespass. For even the understanding of a whole people contrary to the law, would not make it cease to be a crime. It is not in a criminal case that the maxim applies, *communis error facit jus.*

The direction of the judge can be considered incorrect, only in consideration that the taking honey under the circumstances of the case was a felony. For it is only in this point of view that it can affect the question of *guilty or not guilty.* Let us then consider the fact of taking honey from what is called *a bee-tree at midnight, and with a disposition to conceal.* The concealment may shew the *animus furandi*, or an intention to commit a felony; yet if a felony was not committed in the act, the intention, however it may be in a moral point of view, will not in law make it felony. The question then will be, whether the taking honey *from a tree on the land of another*, with an intention of concealment, will amount to felony. *This must depend on the honey being the property of the owner of the land.* If the bees are his property, the honey is; for it is the manufacture of his hive. It is the production of what may be called his flock. But this requires proof in the first instance, that *the bees are his property.* The treeing on his land may form some presumption of it; but this is not sufficient in a criminal case, when it is notorious in natural history, that there are wild bees, or bees *feræ naturæ* as is the learned phrase. Bees not reclaimed from their wild nature and domesticated, are not the subject

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of property, any more than wild fowl, or wild beasts. It cannot necessarily be inferred therefore, that the honey made in a tree on another's land, is made by the *bees of the owner of the land.* But it may be made out of the vesture of his land, and therefore *his property.* "*The bee sits on the bloom* "*extracting liquid sweet;*" and if the flowers are his, the honey is his property. For though it is changed by *constipation*, "*purissima mella stipant*," yet it is but the liquid condensed or thickened by working into honey; and the taking away butter is not the less a theft, because the taker had churned it from the milk of another. Here however a difficulty occurs; it may not have been the *herbagium terræ*, the herbage of the owner of this land, from whence the liquid was extracted that was made into honey. Bees do not confine themselves to the fruits or flowers growing near, but move to a distance; "*Floriferis ut apes in saltibus omnia* "*libant.*" It cannot therefore be made out to a certainty that the honey has been made *out of the grass, or vegetables, of the owner of the land on which the tree is.*

This may seem an investigation to a minuteness partaking of the ridiculous. But it has not seemed to me possible to treat it otherwise. For though *in tenui labor*, yet the subtilty becomes necessary in order to discriminate. I have no idea that the understanding of the country could make it more or less a felony to take honey from the *alveare*, or to use the *Anglo Saxon* word, the *skep* of a bee-tree on another man's land; yet it does not follow, that it cannot be considered but a felony; and this I take it is the objection to the charge of the judge, that it did not depend upon the understanding of the country whether it was felony or otherwise, but upon the *common law, by which it did not necessarily follow that it was felony.*

My idea of the common law, in this particular, is deduced from principle; and is the same with that of the *Roman civil law.* "Apium quoque fera natura est. Itaque quæ in arbore "tua consederint, antequam a te alveo includantur, non magis "tuæ intelliguntur esse, quam *volucres* quæ in arbore tua ni- "dum fecerint. Ideoque si alius eas incluserit, is earum domi- "nus erit. Favos quoque, si quos effecerint, eximere quilibet

"potest. Plane integrâ re, si prævideris ingredientem fun-
"dum tuum, poteris eum jure prohibere ne ingrediatur."

Aldobrand in his note on this, thinks that the occupancy, by being in the tree on the land of another, gave a property. "*Dominus fit per occupationem.*" But I incline to think that such occupancy does not give a property. A trespass would be committed in coming upon the land to take the bees or combs in this case, but not in taking the bees or combs would there be a trespass, if they could be taken without coming on the land, much less a felony. It is the same as with wild fowl who have been brooded and are roosting upon the land, which if they could be taken without *ingress*, there would be not even a trespass.

Another *objection* to the charge of the judge, has more solidity; or rather, I mean to say, is more difficult to remove. It is, that evidence was admitted, though objected to, of words spoken *since the bringing the action, that are in themselves actionable;* words to the same effect with those laid in the declaration, but spoken *after suit brought.* I take it they might be given in evidence to repel an allegation of having been originally spoken *without malice*, if that were the defence that were set up. But whether they can be given *in aggravation of the malice*, is more difficult to support. Defamatory words imply malice; but accompanied with words indicating ill will, whether at the time of speaking, or at any other time, may be evidence of actual malice, which aggravates the wrong of speaking; more especially on the plea of *non cul*, which goes to the malice with which the words are spoken, as well as to the speaking of the words. Hence it is, that evidence of an acknowledgment made after suit brought of having spoken the words, would be evidence of the speaking; and the speaking the same words after suit brought, would raise a presumption in support of what was alleged, that such words had been spoken before suit brought; and on the same principle, would raise a presumption that *they had been spoken maliciously.*

There is nothing in the argument from the statute of limitations; for the words laid in the declaration must be proved to have been spoken *within the year*, before evidence can be given of any spoken after suit brought. But it may be

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said with more solidity, that the giving evidence of words spoken after the suit brought, and the recovery on the aggravation of them, cannot be *pleaded in bar to a new action for the same words*, if actionable. I do not see but that the special matter might be pleaded, and given in evidence. It would prevent the multiplying of suits, *embracing all that preceded the trial*, subject only to this consideration, *that the defendant is not taken by surprise, as to any evidence offered.*

In trespass real, and in nusance, the continuance is not admissible in evidence, in aggravation; but a new action must be brought on the continuance; and so *toties quoties*. But there is a difference; for in these cases the *quo animo* is not the gist of the offence, nor does the allegation depend so much upon the conception and memory of witnesses, or general disposition of the alleged wrong-doer towards him that is wronged, as on the mere matter of fact, *the thing being done*, the only qualification of which can be *voluntary* or *involuntary*, with regard to the damage; though I do not see the inconvenience of proving damages even up to the time of trial in the case of trespass real, or nusance, as the jury computes interest on a bond up to the time of trial, under the head of damages, and the court will give judgment; unless perhaps the preserving the separation and simplicity of cause of action, and confining the demand, have the superior advantage.

In the case of a personal trespass, assault and battery, evidence of what has taken place since the suit brought, may be given in evidence to increase the damages, such as debility or the losing the use of a limb. This as shewing the extent of the trespass laid in the declaration. On the same principle, in slander, where the *per quod* or special damage is the gist of the action, the effect may be shewn by what has been consequent to the suit brought, provided a special damage has been proved sufficient to support the action. It is not therefore correct to say, that in all cases no evidence can be given that has relation to a fact *after suit brought, and before trial.* In *Buller N. P.* 7. it is said, that though he (the plaintiff) "cannot give evidence of any loss "or injury not laid in the declaration, yet after he has proved "the words as laid, he may give evidence of other expres-

"sions made use of by the defendant, as a proof of his ill "will towards him." This in the reason of it goes to words *spoken after suit brought, as well as before;* and I can draw no distinction between words actionable and not, as to the admissibility, but *à fortiori* as to the effect; and by pleading or averment, the having been given in evidence may be shewn, should another action be brought on the ground of speaking these.

New trial refused, and Judgment confirmed.

For cases on the first point, see *Charlter* v. *Barret*, *Peake's N. P. Cases*, 22., *The King* v. *Pearce*, *ib.* 75., *Mead* v. *Daubigny*, *ib.* 125., *Lee* v. *Huson*, *ib.* 166.

For the second point, see 2 *Bl. Comm.* 392., *Bro. Abr. title Property* 37.

EBERSOLL *against* KRUG and Wife.

IN ERROR.

Lancaster, Friday, May 31.

Slander of husband and wife cannot be joined in the same action.

See 8 *Wentworth* 262.

THE declaration in this case set forth, that "whereas the said *Philip Krug* and *Mary* his wife are *both* true honest and upright citizens of the commonwealth of *Pennsylvania*, and as such from their nativity hitherto have demeaned themselves &c., and the said *Mary* for herself had deservedly obtained a good name &c., and had never been charged or suspected of the crimes of adultery or fornication &c., and that *neither the said Philip nor Mary his wife* have been charged with or committed any of the crimes of larceny, burglary, arson, robbery or any other crime or offence, which *if they or either of them* were convicted of, would subject *them* to an imprisonment in the cells of the penitentiary of the city of *Philadelphia*, or in any other place of confinement or imprisonment of criminals; yet the said *Abraham* the defendant, well knowing &c. and maliciously intending *the said Philip Krug and his wife* not only into scandal and infamy

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among their neighbours and others to bring, but to subject *them* to the infamous punishment provided by law against thieves, robbers, burglars &c. and against fornication and adultery, on the first of *June* &c. at the county aforesaid, the following false and scandalous *German* words of and concerning *the said Philip Krug and Mary his wife* in the presence &c., which said *German* words have in the *English* language the import and interpretation following; "*George* "*Krug*" (the son of the said *Philip* the plaintiff meaning) "is not the son of the said *Philip Krug*, but the son of a "certain *Peter Ox*," (thereby meaning that the wife of the said *Philip Krug* had committed adultery with the said *Peter Ox*.) And again "*George* cannot be his son, he is so "much larger;" (meaning that *George Krug* cannot be the son of the said *Philip Krug*, and therefore again meaning that the wife of the said *Philip* had committed adultery.) And again addressing himself to *Samuel Good* and *John Hansen* who were driving an ox, "your ox is not so heavy "as the ox that ran off with *Philip Krug's* wife;" (thereby meaning that the said *Mary* had run off with the said *Peter Ox*, and had committed adultery with him.) "I will put "*Philip Krug* and his wife in the cells in *Philadelphia*, "and if that won't do, I will put them in the workhouse;" (thereby meaning that the said *Philip Krug* and *Mary* his wife had committed some heinous offence or offences which would subject them to imprisonment in the cells of the *Philadelphia* jail and penitentiary.)"

Various errors were assigned, but the material one was, that there was a misjoinder of action, in uniting pretended causes of action on the part of the wife, with similar causes of action on behalf of the husband.

Elder and *Hopkins* for the plaintiff in error.

Laird and *Montgomery* for the defendants in error.

TILGHMAN C. J. and the whole court agreed that the judgment must be reversed, because the slander of the husband and slander of the wife were here joined in one action, and damages sought for the slander of both at the same time.

Judgment reversed.

3b 557
8sr 32
16sr119
17sr310
2r 192
2r 300
1pw424
2w213
6w382
5 511
9 431

Lancaster, *Saturday*, May 25.

JANE WILSON *against* JOHN WILSON.

THIS was an appeal from the judgment of the late Mr. Justice *Smith* at a Circuit Court for *Lancaster* in *May* 1808.

An executor in the state of *Pennsylvania* has always been a trustee for the next of kin, as to all the personal property of the testator not disposed of by his will.

An action for money had and received will lie against an executor in his personal character to recover a distributive portion of the testator's estate not disposed of by his will, and which has come to the executor's hands as trustee.

It was an action for *money had and received*, brought by the plaintiff, who was the widow of *John Wilson* deceased, to recover from the defendant who was his executor, her distributive share of so much of the testator's personal property as was not disposed of by his will. The writ and the recital in the declaration were against the defendant *as executor;* the count was against him personally, as upon a promise in his individual character. Pleas *non assumpsit*, *and payment.*

Upon the trial of the cause the material evidence was this. *John Wilson* the testator, on the 31st of *August* 1789 made his last will and testament, in which, after ordering that all his just debts and funeral expenses should be fully paid out of his personal estate, he gave to the defendant, who was his son, the plantation on which he then lived, together with all his mountain and timber land in *Chester* county, in fee simple. He gave to his daughter *Mary* 400*l.*, to his daughter *Margaret* 400*l.*, to his grandson *John Hamilton* 100*l.*, to his grandson *John Teters* 50*l.*, to his son-in-law *Samuel Bigart* 10*l.* without any deduction, and to his granddaughters *Sarah* and *Margaret Bigart* 50*l.* each. He further ordered that his well beloved wife *Jane Wilson* should have the profits of the place he lived on during her natural life, and after her death that it should fall into the hands of his son *John*. He then directed that "the land where *Robert Knox* "now lives on in *Leacock* township, together with fifty acres "of timber land lying in *Lampeter* township, be sold after my "decease, and 100*l.* of the purchase money be paid to my "daughter *Margaret Hamilton*, and the interest of 100*l.* "to be paid to my daughter *Mary Teters*, and at her de- "cease the said 100*l.* to be divided equally between her "children. And lastly, I do appoint and constitute my be- "loved son *John Wilson*, and my son-in-law *Robert Hamil-*

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"*ton* to be my executors to this my last will and testament, "and I do hereby disannul all former will or wills, and con- "stituting this and this only to be my last will and testa- "ment."

Robert Hamilton renounced; and on the 1st *February* 1802 the defendant settled his account in the register's office, by which, after paying debts and legacies and a commission which he charged for his services, a balance of personal estate was found due of 2369*l.* 17*s.* 4*d.*

The plaintiff obtained a verdict for 621*l.* 3*s.* 3*d.*, which Judge *Smith* refused to set aside; and it was from this decision that the defendant appealed.

The case was first argued at *March* term 1809, by *Montgomery* and *Tilghman* for the plaintiff, and by *Hopkins* for the defendant, who made two points. 1. That an action for money had and received would not lie against the defendant in his own right, but that it should have been a special action on the case against him as executor. 2. That the defendant took the surplus personal estate of the testator not disposed of by his will, beneficially, and not as trustee for the next of kin.

The *second* point was again argued at *May* term 1810, by *Hopkins* for the defendant, and by *Bowie* for the plaintiff; and having been held under advisement until this day, the judges now delivered their opinions.*

TILGHMAN C. J. This is an action on the case for money had and received, brought by the widow of *John Wilson* senior, against the executor of her husband's will, to recover her share of her husband's personal estate. The defendant makes two objections to the plaintiff's recovery. 1. That an action for money had and received does not lie in this case. 2. That all that part of the testator's personal estate, not disposed of by the will, is vested in his executor for his own use.

1. The first objection is founded on the impropriety of making the executor personally responsible for property which came to his hands *as executor*, and cases were cited to

* See *Grasser* v. *Eckart*, 1 *Binn.* 575.

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shew, that in *England* an action for a legacy will not lie against an executor, unless he has made an express promise to pay it. But these cases establish no principle sufficient to bar the plaintiff's action. The courts of *common law* in *England*, have no jurisdiction in cases of legacy, and therefore nothing less than an express promise will support an action. But in this state, where we have neither ecclesiastical courts, nor a court of chancery, the case is different. We have recourse to the courts of common law from necessity. For although the Orphan's court may inforce their decrees by attachment, yet that is but an imperfect remedy. These considerations induced the legislature of *Pennsylvania* long ago, to pass an act for the recovery of legacies in the common law courts; and the courts have thought themselves justified in supporting an action in a case like the present, which is not a demand for a legacy, but for the share which belongs to the wife on a *partial intestacy* of her husband. The action for money had and received being very convenient in its form, has been encouraged by our courts. It is well adapted to a case like the present. The plaintiff does not claim by virtue of any demand which she ever had against the *testator;* there is no occasion therefore, that her judgment should be against the goods of the testator. Although the personal estate came originally to the hands of the defendant *as executor*, yet the money which remains after the payment of debts &c. may not improperly be considered as received by him for the use of those persons to whom by law it belongs. Their claim against him is *in his own right*, for withholding the money which he unjustly detains. I am of opinion therefore that the form of action is proper.

2. The second point would have been of very great moment, if an act of assembly had not been passed, by which *in future* an executor is declared to be a trustee for the next of kin. It is the law *before* the making of that act, which we are now to decide. The principles by which the personal estate of deceased persons is disposed of, were settled at a period when personal property was generally of small amount. In *England*, in case of intestacy the ordinary took it into his possession, not for the purpose of paying the intestate's debts, and distributing the residue among his kin, but to dispose of

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in *pious uses* for the *good of his soul*. This mistaken piety, which trampled on the first principles of justice, was at length seen in its true light; and by the statute 31 *Ed.* 3. *ch.* 11, the ordinary was directed to depute the next and most lawful friends of the deceased, to administer his goods, to collect the debts due to him, to pay those which he owed, and be accountable for the rest, in the same manner as executors in case of testaments. At the same early period it was established, that an executor by virtue of his appointment became intitled to all that part of the personal estate not given away by the testator. No good reason has been assigned for this. The business of an executor is to perform the will of the testator. It is so understood by most people who make wills, nor have they any idea of the unnatural inference, that what is not expressly given to other persons, is supposed to be given to the executor. The *English* courts of justice have long felt the injustice of the principle, and struggled to evade it. It was decided by the chancellor, in the case of *Foster* v. *Munt*, 1 *Vern.* 473, that the testator having given a legacy of 10*l.* a-piece to his executors for their care, they should be considered as trustees for the next of kin, as to that part of the estate which was undisposed of by the will. This decision was so much in unison with the feelings and understanding of the nation, that it has never been questioned; and it is material, that the settlement of *Pennsylvania* took place about the time that the law was thus modified in *England*. By the *English* law an executor has no compensation for his trouble, unless it is given to him by the will; but among us, as far back as the testamentary law can be traced, he has had a compensation. This was putting the matter on its proper footing. The executor was considered as a person appointed to execute the will of the testator, for which he was to receive a reasonable compensation. The inference is strong, that it was not intended he should take any part of the estate, which was not expressly given to him by the will. There are many instances in which the common law of *England* has not been received in this country, although it was not taken away by act of assembly. The land of deceased persons is applied to payment of debts in exclusion of the widow's dower. Married women have always been allowed to transfer their

right to land, without fine or recovery. It is unnecessary to mention other instances. Since the case of *Foster* v. *Munt*, it has been taken for granted in *England*, that if the testator gives a *legacy* to the executor, he does not intend that the executor shall take the residue for his own use. Then why should it not be taken for granted *here*, that it cannot be intended the executor should take for his own use, when every testator knows, that the executor is intitled by *law* to a compensation for his trouble? I am satisfied that it has been so taken for granted; that such has been the general understanding and practice. This point has never been decided by the Supreme Court. I understand, that about the time of the revolution, it was brought forward in the court of Common Pleas, but went off in the confusion of the war, or for some other cause not known. I know that it has occasioned some diversity of opinion. But when I say, that I believe the general understanding and practice to have been in favour of the next of kin, I rely not only on information received from the living, and from some of the dead, whose experience was carried back to early times, but upon the usage of the Register and Orphans' courts appearing on their records, where it will be seen that in all settlements (not excepting even the estate now in question) a commission is allowed the executor for his care and trouble. Now if he was intitled to the surplus, there would be an impropriety in allowing him a commission, because it would be only taking it out of his own pocket.

But *Boudinot* v. *Bradford*, 2 *Dall.* 268, has been cited to the contrary. The words are these. "But, *by the court*, "there is no such distinction (meaning a distinction be- "tween the law of *England* and of this state) to be found "in any act of assembly, or judicial determination. The "next of kin are *only* intitled to personal estate in the "case of intestacy, and a man cannot be intestate, who has "made an executor." This report is certainly inaccurate in more respects than one. The *dictum* was not by the *court*, but by the *Chief Justice only;* nor did the other judges express any opinion, or consider the point alluded to as having been decided. This has been several times declared by the late judge *Smith*, both in private, and in his seat on the bench; and I know that his notes make no mention of any such de-

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cision. The opinion of Chief Justice *M'Kean*, I shall always consider as very respectable, but not to be compared to a decision of the court. There must be a mistake however, as to his having said that the next of kin could *only* take in case of an intestacy; for he well knew, that where a *legacy* is given to the executor, he is considered as a trustee for the benefit of the next of kin.

I have endeavoured to ascertain the opinion and practice of the courts in our sister states, but have not been able to procure such satisfactory information as I expected. In *Maryland*, the executor has always received a commission founded on act of assembly, and always been considered as a trustee for the next of kin, although there was no act of assembly to that purpose. In *Virginia* the law has been received as in *England*, until altered by act of assembly. At present the executor is a trustee for the next of kin.

Where a rule of property has been settled, I shall never think myself at liberty to alter it, even though I should suppose that it had been founded on a mistaken principle. But considering the point before us as completely open, I must declare my opinion, that in consequence of the acts of assembly allowing a commission to executors, the common law of *England* has in this respect never been received in *Pennsylvania*, and the executor must be considered as a trustee for the next of kin.

YEATES J. It is the settled rule in *England*, that the naming of executors is by implication a gift to them in law of all the goods, chattels, credits and personal estate of the testator. *Wentw. Off. of Exrs.* 4. 5., *Toller* 275., *Roper on Legacies* 219. It lays on them an obligation to pay his debts, and makes them subject to every man's action for the same. In *Newstead* v. *Johnston*, 2 *Atk.* 46., more fully reported in 2 *Burn's Ecc. Law* 168. *4th ed.* Lord *Hardwicke* says, as the law stands now, where a person appoints one executor, it is giving him the residue, unless there is a particular legacy. And the same rule holds in the ecclesiastical courts. The judicious Mr. *Coxe*, in his note on 1 *Pr. Wms.* 550., and *Fonblanque* in his notes on the *Treatise of Equity*, *vol.* 2. *p.* 131., lay down the law in the same manner, and each

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of them has collected the result of the many cases on this subject. Having stated the rule of law, they proceed to say, that if in equity it can be collected from any circumstance or expression in the will, that the testator intended his executor only the office and not the beneficial interest, such intention shall receive effect, and the executor shall be deemed a trustee for those on whom the law would have cast the surplus, in case of a complete intestacy. *Equal* pecuniary legacies will exclude executors from taking the surplus; 1 *Vern.* 473., 2 *Vern.* 676., *Pre. Cha.* 81., 3 *Pr. Wms.* 194. *note*, 1 *Pr. Wms.* 544., 2 *Pr. Wms.* 162., 2 *Vesey* 162.; but wherever the legacy is *consistent* with the intent that the executor should take the whole, a court of equity will not disturb his legal right; as in the case of a legacy to one only of two or more executors, neither shall be excluded from taking the surplus, because the testator might intend to such a one a preference *pro tanto*. *Prec. Cha.* 323., 4 *Bro. Parl. Ca.* 1., 2 *Ves.* 167. 166. 91. And so where several executors have *unequal* legacies, whether pecuniary or specific, they shall not thereby be excluded from the residue. 2 *Atk.* 68., 2 *Ves.* 27. The rule is universal, that wherever the legacy to the executor is consistent with the intent that the executor should take the undisposed residuum, chancery will give him no obstruction. *Toller's Law of Exrs. and Admrs.* 277., 7 *Bro. Parl. Cas.* 1., 2 *Burn's Ecc. Law* 172. The different determinations cannot be reconciled in principle to each other. This must be resolved into the different inclinations of the chancellors to favour, some the legal, others the equitable rule, and endeavouring to make the favoured rule apply to the case before them. 1 *Wash.* 65. We are told, 1 *Stra.* 569., that lord chancellor *King* brought a bill into the house of peers, which passed that house, to settle the *vexata quæstio;* but upon sending it down to the commons, it was thrown out upon the first reading, a bill sent up by the commons to prevent bribery and corruption in elections, having been refused to pass in the house of lords. The bill was to have settled it for the benefit of the executor.

It has been questioned, whether the law of *England* in this particular is applicable to *Pennsylvania*, or has been acted on as such. By the fifth section of the royal charter, 1

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Dall. St. Laws Append. 2., it was provided, that the laws to be enacted here should be consonant to reason, and not repugnant or contrary, but (as near as might be conveniently) agreeable to the laws, statutes and rights of the kingdom of *England*. The preamble of the "act for the advancement "of justice and more certain administration thereof," passed 31st *May* 1718, 1 *Dall. St. Laws* 133., recites "it to be a "settled point, that as the common law is the birthright of "*British* subjects, so it ought to be their rule in *British* do-"minions." The act of 28th *January* 1777, *Ib.* 723., immediately after the *American* revolution, declares, "that the "common law and such of the statute laws of *England*, as "have heretofore been in force, shall be in force, and bind-"ing on the inhabitants of this state, except as is thereafter "excepted." It would be a waste of time to cite more laws on this subject. Our statute book teems with the same language. But the act of 28th *February* 1780, *Loose Laws* 289. *s.* 3, 4, 5.; 13th *April* 1791, 3 *St. Laws* 93. *s.* 3. 16. 17.; 4th *April* 1797, 4 *St. Laws* 156. *s.* 2., and 2d *April* 1802, 5 *St. Laws* 158. *s.* 2., authorizing the trial of the feigned issue at *Sunbury*, may be particularly adverted to upon this point.

Whence then is it, that a court of justice is authorized to consider this part of the common law respecting the legal rights of executors, as inapplicable to this state? The legislature by a law passed on the 7th *April* 1807, 8 *St. Laws* 159. 1*st part*, have deemed it necessary to enact, that on a will not disposing of the residue of the personal estate, the executors shall distribute the undisposed residue among the next of kin. It is true, that nothing is affirmed or denied therein as to undisposed residues prior to the passing of the act; but the law furnishes a strong exposition of the sense of the legislature, as to the extension of the common law in the particular under consideration.

It has been objected, that testators never contemplate that the undisposed residue of their personal estates will pass to their executors. It is presumed that this observation would equally apply to the inhabitants of *Great Britain;* and likewise that as well there as here, it is not generally known, that a creditor making a debtor his executor thereby extinguishes the debt, *Hob.* 10., *Co. Litt.* 264 *b.*, 1 *Salk.* 300., un-

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less it is otherwise specially provided for, or the residuum of the estate be disposed of, *Cas. Temp. Talb.* 240., *Cha Ca.* 292., or there be a deficiency of assets to pay debts and legacies, 2 *Bac.* 380., 4 *Bac.* 269. So where a devise to a widow is not specified to be in lieu of dower, she is not precluded from dower. A number of vulgar errors have been enumerated by Judge *Barrington* in his observations on the ancient statutes, *Barringt. Stats.* 474. 4*th ed. note* 2., which have been added to by Sir *Wm. Blackstone*, 2 *Bla. Com.* 53., and by *Christian* in his notes, 1 *Bla.* 401. *note* 8. But such mistakes cannot change the law, which every man is supposed to know.

It is more formidably objected, that the legal right of the executor to the undisposed residuum is founded on the principle of a supposed compensation for his care and trouble, for which in *England* no allowance is made to him, 3 *Pr. Wms.* 249., and that he is only allowed his reasonable expenses. 4 *Burn's Eccl. Law* 416. He there has nothing but the management of the personal estate, 1 *Pr. Wms.* 553., unless it be otherwise directed in the will. Whereas by the laws agreed upon in *England* respecting the settlement of the colony, 1 *Dall. St. Laws App.* 22. *s.* 14., lands were made liable to pay debts, which were pursued by many subsequent regulations of the same nature, so that they became *quodam modo* chattels, and thereby introduced a radical change in the rights and duties of the personal representatives of deceased persons; and the act "for establishing Orphan's "Courts" passed in 1713, 1 *Dall. St. Laws* 99., authorizing them "to order the payment of such reasonable fees for "copies, and for all other *charges trouble and attendance*, "which any officer, or *other person* shall necessarily be put "upon in the execution of that act as they should deem just "and reasonable," made an alteration in our municipal system, which destroyed the ancient rule of law in such cases.

These objections demand particular consideration. It is obvious that they are grounded on the assumption, that the legal principle contended for by the defendant, is bottomed on a supposed compensation for the care and trouble of the executor. But is this really the case?

I do not find that the elementary writers, either ancient

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or modern, derive the foundation of the law from this source. In the old books it is uniformly spoken of as a gift or donation by the testator. *Wentw. Executor* 4. 5., *Swinb.* 40. 6*th ed.*, 4 *Burn's Ecc. Law* 166. The executor takes all his personal property subjected to the payment of his debts and legacies; and it is presumed, that the testator had no more special will, than he had thought proper to declare. The fundamental presumption which the law makes, is, that the appointment of executors is a gift to them of what is undisposed of. It is true that in *Foster* v. *Munt*, 1 *Vern.* 473., a legacy of 10*l.* apiece to two executors for their *care*, was held to exclude them from taking a beneficial interest in the surplus. The decision went upon the ground, that the will afforded a reasonable conclusion that the testator meant to give each of them the legacy of 10*l.* for their trouble, and no more; for it would be absurd to give them expressly a part, if it were intended that they should have the whole; or according to a quaint phrase, they cannot take all and some. So in other cases.

I agree, that the general practice of this state is, for executors and administrators to charge for their trouble, in the settlement of their accounts, under the character of commissions; but I cannot collect from thence, that they exclude themselves from taking the undisposed surplus, where there is no reasonable presumption of a contrary intention in the will. I take it, that the origin of the legal right is to be ascribed to the bounty of the testator, when he nominates his executors. I see much danger in unsettling ancient established rules, unless on the most solid grounds. It is the office of the legislative branch alone to do this on grounds of public convenience. I know of but one decision, wherein this question has been solemnly determined in the tribunals of this state; but the observation of *M'Kean* Chief Justice in *Boudinot et al.* v. *Bradford* in *December* 1796, 2 *Dall.* 268., uncontradicted I may at least say by any of the members of this court, that there was no distinction between the law of *England* and *Pennsylvania* as to the point now under consideration, has in my idea considerable weight. The opinion of Mr. President *Wilson* in *Davis* v. *Davis's Executors* in *Delaware* county is to the same effect in *April* 1806. It

is incumbent on those who advocate a change in the old settled law, to shew some act of assembly or judicial determination authorizing such change. I know of no practice which has obtained on this particular point. I know of no opinions which have been entertained by the profession on it; and presume that many gentlemen differ therein. For myself, I can only say, that I can see no solid grounds upon which I can judicially pronounce, that this part of the common law is not applicable to our local situation and circumstances. What gave birth to it in the first instance has no weight in my mind.

It would afford me some relief upon the present occasion to be informed, how this legal question has been considered by the judiciaries of our sister states, wherein executors receive compensation for their care and trouble in administering on the estates of testators. I have been able to find but two cases of the kind in any of their reports. That of *Shelton's Executors* v. *Shelton*, 1 *Wash.* 64., in the court of appeals of *Virginia* in fall term 1791, wherein the residuary estate undisposed of was held to go to the executors, it being always the case, as *Pendleton* president remarked, where there are several executors, and unequal legacies given to them. Judge *Tucker*, 2 *Tuck. Bla.* 514. *note* 44., remarks on that decision, that it seems to have been settled thereby, that such undisposed residuum, where no intention of the testator to the contrary appeared, *did* belong to the executors; that neither a devise of lands, or other *real estate* to an executor, nor a legacy to a *brother* as such, without referring to his official character as executor, of money, or other personal property, (although the brother were likewise constituted an executor) was a sufficient manifestation of such an intention to the contrary, as to preclude him from taking the residuum as executor. This resolution more strongly applies to the question before the court, as in *Virginia* executors are intitled to compensation for their services. 1 *Wash.* 250.

In *Denn on the demise of Snedeker et al.* v. *Allen*, 1 *Pennington* 44., in *New Jersey* in *May* term 1806, Judge *Pennington* declared, that an executor was intitled to the residue where it was not disposed of in express terms; and he

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recognised the practice of that state of allowing a reasonable compensation for services performed by an executor.

I have examined with some care the late reports of cases decided in the states of *Massachusetts*, *Connecticut*, *Vermont*, *New York*, *Maryland*, *North* and *South Carolina*, without success, for other decisions on this subject.

Upon this head of argument the matter thus stands. Upon the one hand, what has been called the individual opinion of *M'Kean* Chief Justice in this state in 1796, the solemn decision of President *Wilson* in *April* term 1806, and the two cases cited above in *Virginia* and *New Jersey*, assert the extension of the *English* law, though the executors are compensated for their care and trouble: and on the other hand, no case has been discovered of a different rule of decision adopted in any of our sister states, by the judicial departments thereof. I thus find myself in trammels from which I cannot escape; and I do not feel myself at liberty, from my private sense of possible individual hardships, to garble that common law, which we have heretofore prided ourselves in, and styled our *birthright*.

Believing, as I have been led to do, on the best consideration I have been able to give to the subject, that the law of *Pennsylvania* agreed as to the particular point before the court, previous to the late act of 7th *April* 1807, with the law of *England*, I proceed to consider the last will of *John Wilson* senior deceased. He devised to his son *John* the defendant the land whereon he lived in fee simple, and also his land in *Chester* county. To his two daughters, grandsons, and granddaughters, he bequeaths several pecuniary legacies, and to his widow *Jane* the plaintiff, the profits of the place whereon he lived, which after her decease was to fall into the hands of his son *John*. He ordered his land in *Leacock* township to be sold, together with 50 acres of his land in *Lampeter* township, and 100*l.* arising therefrom to be paid to his daughter *Margaret Hamilton*, and the interest of other 100*l.* to be paid to his daughter *Mary Teters*, and at her decease the money to be equally divided among her children; and he appointed his son *John* and his son-in-law *Robert Hamilton* his executors. *Hamilton* renounced.

I consider at present the rule to be, that making an executor does vest in him the personal estate of the testator,

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unless a *reasonable* ground appears upon the will, that the testator did not intend by making that executor to vest in him the residue.

Considering this then as a question of *intention*, what reasonable ground does the will present to shew that the testator did not intend his executor should take the surplus? What circumstance or clause on the face of the will, will give our minds sufficient satisfaction in this particular? The rule of law is, that the appointment of executors vests in them all the personal estate of the testator not otherwise disposed of. The will contains a devise of lands to his son *John* both in possession and remainder, but he takes no legacy either pecuniary or specific. To his son-in-law *Robert Hamilton* there is no devise of land or legacy whatever. They are not called executors *in trust*, 2 *Vern.* 99., 2 *Pr. Wms.* 158., 2 *Atk.* 18., 2 *Ves.* 91. 495., nor do any other expressions occur in the will, shewing the *office* only to be intended them, and not the beneficial interest. I lay no stress on the circumstance of an only son being one of the executors, since notwithstanding the case of *Ball* v. *Smith*, 2 *Vern.* 675., it now seems settled, 1 *Pr. Wms.* 550., that even a wife appointed executrix, is as to the residue precisely in the situation of any other person appointed executor. In whatever light I view this will, I see no provision in it inconsistent with the executors taking beneficially the undisposed residue of the personal estate of the testator, and this renders it unnecessary for me to consider whether the form of the action has been misconceived.

I am of opinion that a new trial should be awarded.

BRACKENRIDGE J. The *claim* of an executor to the surplus, is *affected* by that of *the next of kin*, who may allege a better right on ground of *natural equity;* for the presumption is, that in the possession of property, there may have been some foundation laid by the acquisitions of a common ancestor; and the means of acquiring more, may not have been wholly independent of the line of progenitors. The natural obligation under which we are to help others, draws closer and stronger, the nearer they are related to us. Natural affection with most persons dictates this, even where

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there is not a sense of duty and moral obligation. Nor is it left only to the strength of natural affection, or a sense of moral obligation; but the municipal laws of all, or of most nations, consult this. We find it in the customs of the *German* nations, from whence we deduce our laws and constitutions. "*Hæredes tamen successoresque, sui cuique liberi, et* nullum "testamentum: *si liberi non sunt, patres, patrui, avunculi.*" *Tacit. de Mor. c.* 21.

"The name of *Saxons*," says *Gibbon*, *Rom. Hist. v.* 2. 276., "escaped the notice of *Tacitus;* yet it is that in which we "have a near and dear domestic interest, these and their "auxiliaries, who so long defended the liberty of the north "against the arms of *Charlemagne*, having filled the *British* "islands with their language, their *laws*, and their colonies." After the settlement of these in *England*, it is recognised as a principle at an early period, "*possessiones uxori, liberis,* "*et cognatione proximis, pro suo cuique jure, distribuantur.*" 2 *Black. Com.* 492. At this time it would seem to have remained the law, that an ancestor could not deprive his next of kin of this right by testament. "But though the origin "of devising, (continues the commentator) cannot be traced, "yet the law by imperceptible degrees was altered, and the "deceased may now by will dispose of the whole of his es-"tate." And where there is a will, and an executor appointed, the next of kin do not succeed immediately to the possession *even of that part of the property* which may be undisposed of by the will; because it is necessary that the testamentary trustee the executor, take the possession of the whole to execute the purposes of the will, until after which, it cannot be ascertained that there is a *surplus*. It would seem also reasonable that after paying debts and legacies, he should have a lien upon the surplus, for a compensation for his trouble. And that this is considered as a ground on which the surplus can be retained, would seem from this, "that wherever courts of equity have seen, on the face of a "will, sufficient to convince them that the testator did not "intend the executor to take the surplus, they have turned "him into a trustee for those on whom the law would cast "the surplus in case of a complete intestacy, that is the next "of kin." 1 *Pr. Wms.* 550., and *Bro. Chan. Cases* 328. "A

"legacy given for care and trouble excludes the surplus." Where that is not the case however, the "executor though "not named residuary legatee, shall take the residuum." 1 *Com. Di.* 359.

In the citation from *Peere Williams*, the term *complete* intestacy would seem to distinguish the devise of a *whole* and a part.

I have not been able to trace when this claim of the executor came to be the law; *the right to the residuum.* It has been said, that from the constituting an executor, a presumption arises of *intending a benefit.* The only presumption that strikes me, is that of a confidence in his understanding and care, and in his good will to do the deceased a service, by the fidelity of fulfilling the trusts of the will, and distribution of the *surplus for the next of kin.* May not this idea of a right to take the residuum, have crept in from a misapplication of the general terms that are used in treating on this subject; which are, that the constituting an executor *is a gift in law, or donationary estate?* It is true; but with this qualification, that it is but a *special property* that is given, not an absolute. It becomes his, not to such extent as *to be liable for his debts, or devisable.* "His assignees under a bank-"ruptcy cannot take it." 3 *Bur.* 1369. This principle equally applying to the surplus in favour of the next of kin, may have been overlooked, personal property at an early period being small, and the surplus still less, after satisfying the dispositions of a will. Or it may have been suffered to remain uncalled for by the next of kin, under an idea of being applied in *requiem animæ of the testator himself;* following the law in the case of intestates' estates, at a time when the church succeeded to *the king* as the general trustee in such cases, and thought themselves justifiable in considering it a conscientious discharge of the trust, to apply the property rather in *pios usus*, than for *the next of kin.* It could not be disputed, but that according to *the notions of these times*, the most pious use was that of saying masses for the soul of the deceased. And though in the case of a *lay executor*, he could not himself say mass in consideration of the residuum, or perform the spiritual service, not having a spiri-

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tual authority, yet he could procure it to be performed by those who were qualified.

But however founded, or in what manner introduced, was this such a principle as was necessarily carried with the emigrants to this province in their colonization? Not if the reason of the rule had been the saying masses in *requiem animæ;* because there was no spiritual authority known to the colonial laws, that could *render the service;* and we have historical evidence, that the greater part of the emigrants were unbelievers as to the efficacy of a mass in benefiting after the decease.

But supposing it to be carried as a principle of the common law into our colonization, as applicable to our circumstances, being founded either on the idea *of a gift ex voluntate*, or a compensation *for trouble* in executing the will, has it not been extinguished by the early acts of the province legislature, or *since* under the state? There are acts at a very early period, providing for the distribution of intestates' estates. Do not these comprehend intestacy even *as to part?* "In case a person made no disposition of such "of his goods as were testable, whether that were only part "or the whole of them, he was, and is, said to die intestate." 2 *Bl. Com.* 494.

But independent of this construction, and meeting that which is the only rational foundation of the claim of the executor, a compensation for trouble, by the act of 1713 a power is given to the Orphan's Court over executors in the case of minors to compel to account, and to allow "rea-"sonable fees for charges, trouble, and attendance in the ex-"ecution of their trust." Has not this act, by an equitable construction, been extended to the case of *the next of kin*, so as to allow compensation to executors in all cases of the settlement of accounts under will. By subsequent acts, particularly that of 1797, *which would seem to be declaratory of this construction*, executors are made compellable as to this particular, on the application of any one interested in the real or personal estate of any decedent, "to give bond "with sureties to the Orphan's Court, and to account in such "manner and time, as the said court according to the usual "course of proceeding in the case of administrators *shall*

"*award and order*." This must comprehend the allowing reasonable fees for trouble in executing the will.

By a preceding act of 1794, sec. 3d, it is provided, that the "*remaining part* of any lands, tenements or hereditaments, and personal estate of any person deceased, *not* "*sold or disposed of by will*, nor otherwise limited by marriage settlement, shall be divided and enjoyed in the proportions and distributions therein regulated, in favour of "the wife, children and *next of consanguinity*." These words, "not sold or disposed of by will," suppose a will, and a sale or sales directed under it, and dispositions made by it as to *some part*, and not as to the whole. What but the surplus in this case could there be to make the subject of the provisions of the section? The very technical term is used, "*remaining part*," the residuum undisposed of by will; that is the surplus. I presume the claim in the case before us must be of the residuum of a testator before the act, and to which it might be thought this act could not retrospectively apply; otherwise the provision is so express that a doubt could not arise. Yet it is to be observed, and I cite it for this reason, that this act is intitled "An act directing the descent of intestates' real estates, and distribution of their "personal;" which shews that the legislature contemplates intestacy *as to part*, *even where there is a will*. This act I *take to be declaratory of what the law was before*, and *with a view to remove doubts* which had come to be entertained, in consequence of what has been reported to have been said, 2 *Dall.* 268., which must be taken with some qualifications. For though generally speaking, both in legal and in popular acceptation, *intestacy* refers to a case where *there is no will*, yet it also embraces the case where *there is a will*, but no disposition *as to some part;* as to which, it is the same thing as if there was no will. This in the express words of the commentator, 2 *Black. Com.* 494. "In case a person "made no disposition of such of his goods as were testable, "whether that were *only part*, or the whole of them, he was, "*and is said to die intestate*." Though it be true therefore that "*the next of kin* are intitled to personal estate only in "the case of intestacy," yet where there is no disposition of the *whole* under a will, it is a case of intestacy as to the part undisposed of. Nor would the court or those of them

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who may in the year 1796 have thrown out the *obiter dictum* referred to, seem to have adverted to this act of assembly of 1794, or to the preceding acts and legal history of the province; or I take it they would have sanctioned the position of the counsel, (*Ingersoll*) "that as to the residuum of personal estate undisposed of by the will, the executor, in "*Pennsylvania*, holds it only as trustee for the next of kin," and which I now deliver as the result of my investigation as what ought to be considered as the law.

With regard to the capacity in which the defendant is called upon to answer for the surplus, whether he ought to be declared against as an executor, or as trustee merely, it may be observed, that in order to determine where one who is executor must sue as executor, it must be inquired, can he sue otherwise in that particular case than *as executor?* And the reason is, because suing as executor in *England*, he is *exempt from costs* to the defendant; and having this immunity, it is just that he be restrained to cases where he cannot *sue otherwise*. The cases in which one who is sued by an executor, has a right to call for a proceeding *as executor*, are where the executor can sue as executor; for the law not giving a defendant costs, save where one being executor proceeds in his own right, it is reasonable that the sphere of the immunity be confined to strict bounds. This reason which exists in *England*, has no place with us; for by the usage of *Pennsylvania*, costs follow the verdict in all cases not excepted by act of assembly. The ground therefore is narrowed; and perhaps the criterion of *Buller*, 4 *T. R.* 280., may be adopted here, as to the bringing actions in a personal or representative capacity, and as to joining counts in the same declaration, "*will the demand when recovered go into* "*assets?*"

Again, where one is made defendant as executor, even here where he recovers or pays costs as the verdict may be for or against him, yet he has different pleas, and the judgment differently affects him, both as to what shall be taken in execution, and as to the recovery and evidence of the demand barred; so that there is good reason why one who is executor shall call for a proceeding against him *eo nomine*. And in a case where the defendant could be sued as executor,

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I would hold a plaintiff to that action. The question then will be in the case before us, *could the defendant be sued as executor?*

The execution of a will can respect only the dispositions of a will, in executing which it cannot but be that the surplus will be thrown upon the executor; but it is not a subject of the testator's disposition. It comes to the executor, but it is not *as executor* that he takes it, unless specially so appointed by the will; and then it becomes a subject of the disposition of the will, that he shall be intrusted with it. In that case he could not be sued *but as executor.* But where his being executor *is but the mere occasion of its coming into his hands*, he cannot be considered as executor *quoad hoc;* and in strictness a suit could not be sustainable against him under the denomination of an executor, not even under the idea of *an executor of his own wrong*, for he could not be said to have *meddled wrongfully* with the property, it having fallen upon him in the course of a lawful act, unless by his detention after a demand, he might be considered an executor of his own wrong. But certainly it cannot be necessary to consider him in that light. The idea of a tortious act may be waived, and he may be viewed in the light of a person having money in his hands for the use of those intitled to receive it. *Non constat* necessarily that he will claim it for himself. The law will not say that it is necessary to presume the worst, or to give the worst names to things. If I place my eye simply on the surplus without looking at the will, as I have a right to do, (for it is not under the will that I claim it, but under the law which gives it to me,) I do not see the executor and am not bound to see him. I see only one to whose hands the property has come to which I have a right. My claim reaches the subject of this demand, antecedent to the will, and independent of it. It attaches on the testator's decease, to the thing, and before it can be supposed to come to the hands of the executor; though nevertheless the mass of the property must pass through his hands, before this can be separated; yet this surplus must be viewed as existing distinct at the decease, from that which could be operated on by the will. I can see no possibility of connect-

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ing the executor with the testator as to this undisposed part of the estate; and as executor, unless it be as executor in his own wrong, after demand made, an action could not be sustained. But the strictly technical and proper proceeding is against him *as a stakeholder, or trustee.* It is a proceeding against the executor *as such*, that I speak of, as that which could not be supported. The bare naming him executor, may be taken as descriptive of *the person*, and not as of *the capacity* in which he is called upon to answer, and may be rejected as surplusage; more especially in this case, where he is named executor in the writ only, and the declaration is against him in his personal capacity.

It is a more solid objection, that the declaration has not been more special, stating the way and manner in which this surplus has come to the hands of the defendant. Certainly such declaration gives no more notice of the ground of the demand than the *writ itself;* and were the case new, I should be willing to turn the plaintiff round to a new trial, and on payment of costs give him leave to amend his declaration; for such a want of specification ought not to be encouraged. A bill in equity in *England*, which is the proceeding in this case, must set forth specially the ground on which relief is prayed; and this which is in lieu of the bill in equity, ought to do the same. Though a declaration *for money had and received for the use*, is the truth of the case, yet there *is more in the case*, which ought to be shewn; viz. the *way and under what circumstance* the money has been received for the use of those interested to receive it.

But this mode of declaring has got a footing, and received the countenance of courts, which would *make it a surprise in a particular case* to exclude it. This laxity of declaring may be helped by the defendant calling for a specification, which the court would certainly direct.

In the case before us it is not alleged that the want of a more specific statement in the declaration has been the occasion of surprise to the defendant; but the objection is raised merely of being technically exceptionable. The justice of the case having been reached, I incline to think the court is not under the necessity of setting aside what has been done,

for the sake of any general principle of law or practice which might be affected. I give judgment therefore so far as my opinion goes, for the plaintiff.

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New trial refused, and Judgment confirmed.

3b 577
6s 226
7 372
7 373

KRŒMER *against* The COMMONWEALTH.

IN ERROR.

Lancaster, Monday, May 27.

THE plaintiff in error was indicted in the Quarter Sessions of *Berks* county, in *April* 1810, of a perjury; and upon his conviction the following sentence was passed upon him by that court: "And now to wit, this 1st day of *April* "1810, the sentence and judgment of the court is, that the "said *Frederick Krœmer* pay a fine of 100 dollars to the com- "monwealth, undergo an imprisonment at hard labour for "six calendar months from this day in the gaol of *Berks* "county, and during that time be confined, *fed*, *clothed*, and "*treated* as the law directs; and further that the said *Frede-* "*rick Krœmer* shall hereafter be disqualified from holding "any office of honour, trust, or profit in this commonwealth, "and from being admitted as a legal witness in any matter "of controversy, and that he pay the costs of prosecution, "and stand committed until this sentence be complied with."

The courts of Quarter Sessions for this state have jurisdiction of all criminal offences which were not capital at the passing of the act of 22d of *May* 1722 Their jurisdiction remains unchanged, although since that act, several offences which were then felonies of death, have ceased to be so; they accordingly have jurisdiction of *perjury*.

The judgment being removed by writ of error to this court, various exceptions were taken to the record and proceedings; but the two principal errors assigned were, 1. That the Quarter Sessions had no jurisdiction of *perjury*. 2. That the judgment was for more than the law directed, inasmuch as the law prescribed nothing in relation to the feeding, clothing, or treatment of a convict for perjury.

Persons convicted of perjury, are liable to fine and imprisonment at hard labour, but not to any particular kind of treatment as to diet or discipline. A sentence therefore which adjudges that the convict shall be confined, *fed*, *clothed*, and *treated* as the law directs, is erroneous.

Hopkins argued for the plaintiff in error, and *C. Smith* for the commonwealth.

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TILGHMAN C. J. This is a writ of error to the court of Quarter Sessions of the county of *Berks*, in which the plaintiff in error was indicted and convicted of perjury. Many errors have been assigned. There are but two however, on which I think it necessary to give an opinion. The first is that the court below had no jurisdiction. 2. That the punishment awarded, was greater than is warranted by law.

1. As the court of Quarter Sessions exercises an extensive criminal jurisdiction, it is of importance that no doubt should remain on that subject. I shall therefore endeavour to mark the line of its jurisdiction distinctly, in order that the legislature if they think it necessary may alter it.

It is provided by our present constitution, made in the year 1790, that there shall be a court of "Quarter Sessions of the "Peace," and a court of Common Pleas for each county; and that the judges of the court of Common Pleas of each county, *any two of whom* shall be a quorum, shall compose the court of "Quarter Sessions of the Peace." It is also provided, that the judges of the court of Common Pleas in each county, shall by virtue of their offices be justices of Oyer and Terminer, and General Gaol Delivery, for the trial of *capital and other offenders* therein, and any two of them, the *president being one*, shall be a quorum. The constitution is silent as to the jurisdiction of the Quarter Sessions; from whence it is to be inferred, that it was considered as a court whose jurisdiction was well known, and in which it was not intended to make any alteration. This leads me to inquire, what was the jurisdiction of this court previous to the adoption of the constitution? At the time of the *American* revolution, all authority under the king of *Great Britain* having ceased, it became necessary to reorganize the courts of justice. Accordingly we find, that by an act passed 28th *January* 1777, the several courts were reestablished with the same jurisdiction, that they possessed before that time. The question recurs, what was the jurisdiction of the court of Quarter Sessions? On this head we are not left to conjecture. The foundation of that and other courts, is found in an act passed the 22d of *May* 1722, intitled "An act for establish-"ing courts of judicature in this province." By the second section it is enacted, that there shall be a court styled "The

"General Quarter Sessions of the Peace and Gaol Delivery," holden and kept four times a year in each county. The third section provides, that the justices of the peace or any three of them, "shall and may hold the said General Ses- "sions of the *Peace* and *Gaol Delivery* according to law, and "as fully and effectually as any justices of the *peace*, justices "of the *assize*, justices of *Oyer and Terminer*, or of *Gaol De-* "*livery* may or can do." It would seem from this, that the Quarter Sessions were to have jurisdiction of *capital* offences. But that this was not the case, will appear clearly from other parts of the act. The third section directs, that every recognisance taken before any of the justices for suspicion of "any manner of felony, or other crime *not triable* "*in the court of Quarter Sessions of the Peace and Gaol De-* "*livery*" shall be certified before the *justices of the Supreme Court of Oyer and Terminer*. By the eighteenth section the justices of the *Supreme Court* are authorized and impowered from time to time to deliver the gaols of all persons, who then were or thereafter should be committed for "treason, "murder, and such other crimes, as by the laws of the pro- "vince then were, or thereafter should be made *capital or* "*felonies of death.*" When all parts of this act are considered, the intention is plain, that crimes punishable with death should be tried by the justices of the Supreme Court, and all other offences by the courts of Quarter Sessions. But the justices of the Supreme Court had likewise jurisdiction of inferior offences, when holding courts of Oyer and Terminer and General Gaol Delivery. That this was the boundary of the respective jurisdictions, I have always understood, and the records of the several courts before the revolution, will prove it. By the merciful improvements of our penal code in the year 1790 and since, no crime but murder of an atrocious nature, is now punished with death. But that has produced no alteration in the criminal jurisdiction, so far as relates to the Sessions. Those crimes which were *formerly* punished with death, remain out of the jurisdiction of the courts of Quarter Sessions. *Act of 22d April* 1794, *sec.* 16. They may be tried however by the same persons who now compose the court of Quarter Sessions, provided the president attends, because, as before mentioned, the

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judges of the courts of Common Pleas compose the courts of Quarter Sessions, and by virtue of their offices, are justices of *Oyer and Terminer* and *General Gaol Delivery*. It sometimes happens, that the sickness of the president prevents the holding of courts of Oyer and Terminer, and in that case, the offences of perjury, forgery &c., may be tried in the Sessions. If this is thought improper, the legislature have the power to order it otherwise. As the law now stands, I have no doubt of the jurisdiction of the court of Quarter Sessions.

2. I will now consider the second point, the judgment rendered by the court below. In order to understand this matter, it will be necessary to take a view of several acts of assembly relative to the punishment of perjury. By the fourth section of the act of 5th *April* 1790, a certain class of offences in which perjury is included, were made punishable (instead of cutting off the ears &c.) by fine and imprisonment at hard labour not exceeding the term of two years; and during the term of imprisonment they were to be fed, clothed, and treated in the manner directed in another part of the said act. This manner of treatment was different in the gaol of the county of *Philadelphia* from what it was in gaols of the other counties, for reasons which it is unnecessary to mention. The present subject relates to the latter only. The twenty-eighth section of the act describes the manner in which those persons should be treated, who were confined in gaols, other than that of the county of *Philadelphia*. Without mentioning the whole it is sufficient to say, that the keepers of the gaol were authorized, in case the convicts were *idle*, or *refused to labour*, or were guilty of any *trespass*, to withhold from them all sustenance, except bread and water, to put *iron yokes* round their necks, *chains* upon their *legs*, or *otherwise restrain in irons* such as should be incorrigible or irreclaimable without such severity. This mode of treatment may amount to a heavy punishment, and it has always constituted part of the *judgment* against convicts, who were subject to it. To avoid prolixity, the judges have generally used this mode of expression, "that he shall be confined, "fed, clothed, and treated as is directed by law." These are

the expressions in the present judgment, and that is the error complained of.

Having shewn what was *formerly* the punishment of perjury, let us see what it *now* is. This will be found in an act intitled "An act for the punishment of perjury, or subornation of perjury," passed 3d *April* 1804. The convict is made liable to a fine not exceeding 500 dollars, imprisonment at *hard labour* during any term not exceeding seven years, disqualification from holding any office of honour, trust or profit, and from being a legal witness in any matter of controversy. The second section repeals so much of any former law, as is thereby altered or supplied. This act was certainly intended to define the complete punishment of perjury; and every former law so far as it related to punishment was repealed. Now we see that nothing is said in this act of the *manner* in which convicts were to be treated during their imprisonment. The question then is, had the court a right to direct the manner? They certainly had not, unless this act can be connected with the former, so as to retain that part of the former which prescribes the *manner* of treatment. If the manner of treatment is a substantial part of the punishment, and if every thing in former laws *inflicting punishment* was repealed, the connexion cannot be supported. But besides, it will appear that the twenty-eighth section of the act of 5th *April* 1790, was confined to persons sentenced to hard labour under the provisions of *that act*. The expressions are, "the malefactors sentenced to hard labour *as aforesaid*," that is to say, under the provisions in *that act*, for the punishment of the several offences therein mentioned. I know of no law by which persons in general, who are sentenced to imprisonment at hard labour, are made liable to any particular treatment. On the contrary, the mode of *treatment* is prescribed in the several acts by which the punishment is directed. This will appear by the act of 22d *April* 1794, sections 4, 5 and 6, by which persons punishable by imprisonment at hard labour for the crimes of high treason, arson, rape, murder of the second degree, forgery, and counterfeiting of gold and silver coin, passing counterfeit notes of sundry banks, and maihem, are expressly made subject to the *treatment* prescribed by an act intitled "An

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"act to reform the penal laws of this state," or by the provisions of the said act of 22d *April* 1794, which made some alteration in the treatment prescribed by the former. And it is remarkable, that in the seventh section of the act of 22d *April* 1794, the punishment of voluntary manslaughter, is by hard labour and solitary confinement, but no particular treatment is prescribed; from whence I infer, that persons convicted of that offence, were not intended to be liable to the same treatment with the offenders mentioned in the fourth, fifth, and sixth sections.

But it has been contended, that the words in the judgment, which relate to the feeding, clothing and treatment, shall be rejected as surplusage, because, if the law directs no particular manner of feeding &c., that part of the judgment can have no operation. I cannot think so. These words were certainly intended to have an operation, and will perplex the gaoler who has the custody of the prisoner. To adjudge that a man shall be fed, clothed and treated as the law directs, implies an assertion, that the law directs some particular mode of feeding &c. A judgment in a criminal case must not be expressed in terms which tend to mislead the person by whom it is to be executed. I am therefore of opinion that the judgment of the court of Quarter Sessions was erroneous.

YEATES J. The present writ of error has been argued with singular zeal and ingenuity. I deem it superfluous to consider all the different exceptions which have been taken to the proceedings; but it is highly important to the peace and good order of the community, that the opinion of this court should be known as to the legitimate jurisdiction of the courts of General Quarter Sessions of the peace and Gaol Delivery of this state.

It has been strenuously contended, that the powers of the Sessions here are the same as in *England;* that their authority is derived from the commission of the justices founded on the statute of 34 *Ed.* 3. *c.* 1., and that the words of the statute have received a known construction. 2 *Hawk. c.* 8. *s.* 18., 4 *Bla. Comm.* 271. No indictment lies before justices of the peace for forgery or for perjury at common law; but perjury on the statute 5. *Eliz.* is indicta-

ble in the Sessions, because it is so directed by the statute. *Regina* v. *Yarrington*, 1 *Salk.* 406. An indictment for perjury at the Quarter Sessions at common law, was quashed for want of jurisdiction. *Rex* v. *Bainton*, 2 *Strange* 1088.

I am fully satisfied, that the jurisdiction of the Sessions is solely founded on our own acts of assembly, and therefore I shall examine those laws as far back as I have materials in my power.

The establishing of all courts of judicature within the government, was granted to the first proprietary by the royal charter. 1 *Dall. St. Laws, App.* 2. *sec.* 5. An act for establishing courts of judicature was passed, 13 *Wil.* 3. in 1701, 1 *Miller's ed. of laws* 14., which was repealed by queen *Anne* 7th *February* 1705, *Ib.* 18. Another act was made, 9 *Anne*, in 1710, *Ib.* 46., which was also repealed 20th *February* 1713, *Ib.* 51. An act for establishing the courts of General Quarter Sessions was made 28th *May* 1715, *Ib.* 56., which was repealed by the lords justices 21st *July* 1719, with two other acts for establishing courts of Common Pleas, and a Supreme or Provincial Court of law and equity, *Ib.* 74. An act for the better recovery of fines and forfeitures due to the governor and government of this province, was passed 28th *May* 1715, which directed that all fines &c. set in the Supreme Court, or in any of the courts of Common Pleas, courts of *General Quarter Sessions of the Peace* and *Gaol Delivery*, or before the special courts of Oyer and Terminer, shall be estreated into the Supreme Court, *Ib.* 57. This act continued in force, until it was repealed by a law passed 18th *March* 1780. The act for establishing courts of judicature, passed 22d *May* 1722, 1 *Dall. St. Laws* 171. The second section erects a *court of General Quarter Sessions of the Peace and Gaol Delivery*, which shall be holden four times in every year in each county; and by section 3, the justices thereof shall hold the same court according to law, and as *fully and effectually as any justices of the peace, justices of the assize, justices of Oyer and Terminer or of Gaol Delivery* may or can do. The fourth section directs them to certify their recognisances to the next sessions; but every recognisance for suspicions of any manner of felony or other crime *not triable before them*, shall be certified be-

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fore the justices of the Supreme Court of Oyer and Terminer. The eighteenth section gives very extensive powers to the judges of the Supreme Court, and it is declared by section 19, that all capital offences or felonies of death shall be inquired of, heard and determined before the same judges. It is enacted then in express terms, that the courts of General Quarter Sessions of the Peace and Gaol Delivery shall possess all the powers of justices of the assize, of Oyer and Terminer and Gaol Delivery; but as to capital offences or felonies of death, the jurisdiction is confined to the Supreme Court. The law, as well as our present constitution, clearly had in view the powers exercised by such official characters in the kingdom of *England*, concerning which an accurate knowledge can be obtained from the *English* books. But the limits of jurisdiction of the Supreme Court and Quarter Sessions are precisely drawn. The Sessions have a concurrent jurisdiction with the Supreme Court as to all crimes cognisable before them, except as to capital offences or felonies of death. Perjury was an offence not capital, and of course triable in the Sessions. There is no ambiguity in the words of the act.

We are told that justices of the peace in *England*, notwithstanding the general expressions of *Stat.* 34 *Ed.* 3. *c.* 1., seldom if ever try any greater offence than small felonies within the benefit of clergy; and that they have no jurisdiction in cases of forgery or perjury at common law, according to the authorities cited. Be it so. The law is so settled by judicial decisions. But in *Pennsylvania*, the act of assembly has received a different construction, and the law is settled otherwise. It has been the uniform practice since the passing of the act, to prosecute forgery and perjury either in the Sessions or Court of Oyer and Terminer, at the election of the person who conducts the prosecution; and numerous judgments for those offences have been rendered in the Sessions. The practical exposition of a law during a period of eighty-seven years, would have a most powerful effect, if even the words of it were dubious, which I firmly deny to be the case here. I have no doubt therefore of the power of the Quarter Sessions to try the present indictment.

Exceptions have been taken to the judgment given upon

the indictment, inasmuch as the prisoner was sentenced to undergo an imprisonment at *hard* labour in the gaol of *Berks* county, and during that time to be *confined*, *fed*, *clothed*, and *treated* as the law directs. It is admitted, that the other parts of the sentence were conformable to the act for the punishment of perjury or subornation of perjury, passed on the 3d *April* 1804. During the argument, it was taken for granted that the adjective *hard* was not to be found in the act. And so it appeared from vol. 7 of *Bioren's* edition page 398. But the sixth volume of *Francis Bailey's* edition page 513, inserts that word. I regret that such a variance should exist in the different editions of our laws, as it may lead to very serious consequences. I found myself therefore under the necessity of examining the original law in the secretary's office, and found that the terms *hard labour* were included therein. The first ground of exception is therefore removed, but the last remains in full force. It has been said on the part of the commonwealth, that the second section of this act repeals so much only of any former law as is thereby altered or supplied, and consequently the provisions in the close of the fourth section of the law of 5th *April* 1790, 2 *Dall. St. Laws* 801., *as to confining*, *feeding*, *clothing and treating a convict as the law directs*, remain in full force. It is contended that the punishment of perjury or subornation of perjury is merely cumulative; but if the court should be of a different opinion, those words in the judgment are merely superfluous, and impose at all events no hardship on the prisoner which is not warranted by law. To this it may be justly answered, that odious as the crime of perjury is, and injurious as it may be to the interests of society, the punishment prescribed by the legislature is sufficiently severe, without recurring to forced construction. A fine not exceeding 500 dollars, imprisonment at hard labour during any term not exceeding seven years, disqualification from holding any office of honour trust or profit, and disability as a witness, are serious evils, which would deter any man from the commission of the offence, who can be restrained by the passion of fear. If the legislature had intended to have gone further, they would have said so in express terms.

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They seem to have made these provisions as a complete substitute for the former punishment prescribed by law.

The words cannot be deemed superfluous. They have a definite meaning in the act of the 5th *April* 1790, sec. 28, as to malefactors sentenced to hard labour in the several counties in this state, other than the county of *Philadelphia*. All power of self government is taken from them, and in case they shall refuse to labour, are idle, or are guilty of any trespass, all sustenance except bread and water may be withheld from them, iron yokes may be put around their necks, chains upon their leg or legs &c. In the fourth, fifth, sixth, ninth, and tenth sections of the act of 22d *April* 1794, 3 *Dall. St. Laws* 599., we find superadded to the punishment at *hard labour* of the several offenders therein specified, that they shall be kept treated and dealt with in the manner prescribed by the act of 5th *April* 1790; but in the seventh section, it is declared, that one convicted of a second manslaughter shall undergo an imprisonment at hard labour for any time not less than six nor more than fourteen years. Two conclusions may be fairly deduced herefrom; one, that where it was meant to inflict this mode of treatment, it is so expressed in plain terms; and in the second place, that these words carry with them a precise and distinct meaning. If the expressions of the act do not imperiously demand, that the *confining*, *feeding*, *clothing and treating the prisoner as the law directs*, should be made part of the sentence, the insertion of them therein naturally leads to an undue severity on the part of the gaoler, and tends to mislead a ministerial officer in the discharge of his duty in a point which ought to be free from all ambiguity. I am therefore of opinion, that the judgment of the Sessions should be reversed.

BRACKENRIDGE J. concurred on both points.

Judgment reversed.

3b 587
5s r425
4r 145
2w 407
80 441

1811.

Lessee of DINKLE *against* MARSHALL.

Lancaster, Tuesday, May 28.

THIS was an ejectment for eighty-five acres of arable and eighty-five acres of woodland in the county of *York*, which was tried before *Brackenridge J.* at a Circuit Court for that county in *May* 1809.

Declarations of the grantor, at and immediately before the sealing and delivery of a deed, admitted in evidence to shew that he did not intend to convey what might nevertheless be included within the description of the deed.

The lessor of the plaintiff by deed dated the 30th of *October* 1773 from one *Thomas Fairley*, became the proprietor of two tracts of land, one containing 148 acres 37 perches, which *Fairley* held under an application of the 27th of *March* 1769 and a survey of the 26th of *September* following, the other, an adjoining tract, containing about eighty-one and a half acres, which *Fairley* claimed by improvement.

On the 9th of *January* 1788, *Dinkle* conveyed to a certain *Andrew Finley* eighty-one and a half acres and allowance, more or less, adjoining lands of *James Marshall*, *Christopher Ebbey*, *Rud. Yount*, and other lands of *Dinkle*, "being "part of two tracts of land conveyed by a certain *Fairley* to "*Peter Dinkle* on the 30th *October* 1773." *Andrew Finley* conveyed to *James Marshall*, the defendant's father.

Under this deed the defendant claimed to hold a part of the land not included in *Fairley's* improvement tract, but in the survey of 1769; and in order to rebut this claim, the court permitted the plaintiff to prove by the subscribing witness to the deed of 1788, that *Dinkle* said to *Finley* immediately before he signed the deed, "*Finley*, I sell you none "but the eighty-one acres more or less called the improve-"ment right land." *Finley* replied "that's all I want, I "bought no other, you may execute the deed." That *Dinkle* again repeated that he sold no more than eighty-one acres more or less held under the improvement, and asked one of the subscribing witnesses to the deed, whether it contained eighty-one acres more or less. That the witness replied it contained that and no more, and with that the deed was executed. That there was some little talk about the land held under the application, but *Finley* said he bought none of that.

Evidence was also given to bring home the knowledge of

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this fact to *James Marshall* under whom the defendant claimed; and the jury found a verdict for the plaintiff, which his honour refused to set aside, being as he reported to this court upon the defendant's appeal, perfectly satisfied with it.

Hopkins for the defendant argued 1. That the evidence of the subscribing witness was improperly admitted, because it went to alter a deed by parol testimony, and even to contradict it by confining it to one tract, when the description expressly included a part of two. 2. That however it might have been as between the original parties, yet this evidence was not competent in a suit against *Marshall* who claimed under a purchaser without notice. On the *first* point he cited *Sugden's Law of Vendors* 88, 89. 104. *Maim* v. *Pearson* (*a*), and *Schemerhorn* v. *Vanderheyden* (*b*). On the *second*, 2 *Fonbl.* 151.

Bowie and *Duncan* for the plaintiff, in answer to the *first* objection cited *Hodgson* v. *Hodgson* (*c*), *Langley* v. *Brown* (*d*), *Baker* v. *Paine* (*e*), *Henkle* v. *The Royal Exchange Assurance Company* (*f*), and particularly relied upon *Hurst's Lessee* v. *Kirkbride*, cited in 1 *Binney* 616., as in point. The *second* objection they said depended upon facts which had been left to the jury, and found for the plaintiff.

TILGHMAN C. J. This case turns upon the propriety of admitting parol evidence, with respect to the deed from the plaintiff to *Andrew Finley*. That deed was for the conveyance of land not accurately described. The description was by quantity, by reference to another deed, and by reference to adjoining lands. The grantor, apprehensive that the grantee might take an advantage of him, said to him in presence of witnesses, just before the execution of the deed, "*Finley*, "I sell to you none but the *improvement right land*." *Finley* replied "That's all I want, I bought no other, you may exe-"cute the deed." After this explanation, the deed was executed, and now the claim under that deed, is not only for the *improvement right tract*, but also for part of *another tract*.

(*a*) 2 *Johns.* 37. (*c*) 2 *Vern.* 593. (*e*) 1 *Ves.* 458.
(*b*) 1 *Johns.* 139 (*d*) 2 *Atk.* 203. (*f*) 1 *Ves.* 318.

This case, as between the parties to the deed, cannot be distinguished from *Hurst's Lessee* v. *Kirkbride*, cited in *Binney*, and so often recognised by the Supreme Court, that it must not now be called in question. But it is said, that *James Marshall*, who devised the land in contest to the defendant, was a purchaser without notice of any conversation that passed at the time of the execution of the deed, and therefore ought not to be affected by it. If that was indeed the fact, it would be a very strong defence. But the plaintiff denied it, and gave evidence on that point, which to say the least of it was worthy of great consideration. *Notice* was a *fact* for the decision of the jury, and it seems the evidence was to their minds satisfactory. I am of opinion, that the parol evidence was properly admitted; as for the rest, the jury having decided that *Marshall* was a purchaser *with notice*, and the judge before whom the cause was tried, being well satisfied with the verdict, there is no ground for a new trial.

YEATES J. concurred.

New trial refused, and
Judgment confirmed.

WAGGONER and another *against* LINE.

IN ERROR.

Lancaster, Saturday, June 1.

THIS was an action of debt upon a bond in the Common Pleas of *Dauphin*, to which the plaintiffs in error pleaded *non est factum* and *payment*.

It is not error in the Common Pleas to refuse leave to the defendant, immediately before the trial of the cause, to strike out the plea of *non est factum*, and to rely solely upon the plea of *payment*.

On the day preceding the trial of the cause, their counsel moved for leave to withdraw the plea of *non est factum*, which the court refused to permit, and upon this writ of error being brought, he assigned it for error, stating the inconvenience of the court's decision to have been, that the counsel of the defendants were thus precluded from concluding.

Goodwin for plaintiffs in error.

Laird contra.

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WAGGONER v. LINE.

TILGHMAN C. J. The only error insisted on in the argument of this cause, is, that the court of Common Pleas would not permit the defendant to strike out the plea of *non est factum*, and go to trial on the plea of *payment*. By this, as is alleged in the assignment of errors, the defendant lost the advantage of the concluding speech to the jury, which he would have been intitled to by the rules of the court on his affirmative plea of payment.

The defendant contends, that he had an absolute right to strike out his plea of *non est factum*, by virtue of the act of 21st *March* 1806 (to regulate arbitrations &c.) In the sixth section, it is provided that "no plaintiff shall be nonsuited "for informality in any statement or declaration filed, or by "reason of any informality in entering a plea; but when in "the opinion of the court, such informality will affect the "merits of the cause in controversy, the plaintiff shall be "permitted to amend his declaration or statement, and the "defendant may alter his plea or defence, on or before the "trial of the cause; and if by such alteration or amendment "the adverse party is taken by surprise, the trial shall be "postponed to the next court." To give this clause the liberal construction to which all laws promoting amendments of pleadings are intitled, whenever the declaration of the plaintiff or the plea of the defendant is not sufficient to cover the *merits of the case*, an amendment may be made either *before* or even *during* the trial; but the court are to judge, whether the amendment is necessary to introduce the merits of the case. Now nothing can be more clear, than that the amendment desired by the defendant, did not affect the merits of his case. On the contrary, he avows that he only wanted to have the last word to the jury. This case then, does not fall within the meaning of the act of assembly. But what was the law before the making of the act? The court had in several instances refused permission to strike out one of the pleas, because they saw that it was a mere stratagem of the defendant, who having first taken the chance of the plaintiff's not being able to procure witnesses to prove the deed, and put him to the expense and trouble of bringing his witnesses, all at once assumed the appearance of candour in relinquishing a defence which could not be supported, but in reality

with a view of gaining that kind of advantage, which arises from the last speech to the jury. In every point of view, the error assigned in this cause is without foundation.

YEATES J. It is self evident, that by a defendant's withdrawing one of his pleas, and resting his defence on the pleas remaining, he cannot reach more readily the merits of his case. Whatever might be given in evidence on two of the pleas, might surely be given in evidence under the same pleas, and the additional one of *non est factum*. The motion for leave to strike out the plea cannot be founded on the act of 21st *March* 1806, which directs the amendment of the declaration or plea, "when in the opinion of "the court the informality would affect the merits of the "cause in controversy." The object of the sixth section of this act was to prevent nonsuits of plaintiffs, where the declarations were informal, and to attain the justice of every case on a full trial. Antecedently to the passing of this law, the point in question has been settled on solemn argument in *Wikoff et al.* v. *Perrot et al.*, *July* term 1791, and in *Jackson et al.* v. *Winchester*, *March* term 1800. In both cases it was held, that a defendant will not be permitted to withdraw one of his pleas on the eve of a trial to give him the benefit of conclusion to the jury.

Were it a new question, why should the practice be otherwise? If a defendant in the progress of the cause, finds that one of his pleas will not serve him, and that in all probability he will be subjected to an increase of costs by insisting on it, he may apply to the court at a previous term to strike out the plea, and the plaintiff on such leave being granted is saved the trouble and expense of adducing proof in support of that issue. This is reasonable and just on both sides. But where a plaintiff in consequence of the issues joined on record, has been at the trouble and expense of procuring his evidence, and his witnesses attend ready to be examined, why shall their examination be prevented by a sudden thought of the defendant, who has pretermitted the proper time for that purpose? The right of conclusion to the jury on the part of the defendant rests on his pleas being wholly in the affirma-

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tive; and if he deems it of importance, he should shape his pleas so as to secure to himself this advantage. If he finds himself to be under a mistake as to one of his pleas, let that mistake be corrected in due season. Failing herein he must submit to the consequences.

I am of opinion, that the judgment of the court of Common Pleas be affirmed.

BRACKENRIDGE J. concurred.

Judgment affirmed.

END OF MAY TERM 1811.

APPENDIX.

THE REPORT

OF THE

JUDGES OF THE SUPREME COURT

OF THE

COMMONWEALTH OF PENNSYLVANIA,

Made in pursuance of an Act of the General Assembly of the said Commonwealth, passed on the seventh day of April, 1807.

REPORTED TO THE

Senate and House of Representatives

On the 19th and 20th of December 1808.

AN ACT

Enjoining certain duties on the Judges of the Supreme Court.

Section I. Be it enacted &c. That the judges of the Supreme Court are hereby required' to examine and report to the next legislature, which of the English statutes are in force in this Commonwealth, and which of those statutes in their opinion ought to be incorporated into the statute laws of this commonwealth.

SIMON SNYDER,
Speaker of the house of representatives.

P. C. LANE,
Speaker of the Senate.

Approved, the 7th April 1807.
THOMAS M'KEAN.

*To the Honourable the Senate and House of Representatives of the Commonwealth of Pennsylvania.**

1808.

REPORT of the JUDGES.

THE undersigned judges of the Supreme Court of the said commonwealth, respectfully submit their report of the *English* statutes which are in force in the said commonwealth, and of those of the said statutes which in their opinion ought to be incorporated into the statute law of the said commonwealth.

They have taken the liberty, at the same time, of submitting a few preliminary observations, connected with the subject of the report, and tending to explain the principles which have governed them in the execution of the trust which the legislature have been pleased to confide in them.

The subject is divided into two branches. 1st, The ascertaining of such *English* statutes as are in force in this commonwealth. 2d, The opinion of the judges, which of the statutes so in force are proper to be incorporated into the statute laws of the commonwealth.

In order to accomplish the first part of the subject, it was necessary to begin with the consideration of the present constitution of the commonwealth. It contains nothing particular as to the point in question. There is a general provision, that all laws of this commonwealth, in force at that time, and not inconsistent with the said constitution, and all rights &c., should continue as if the said alterations and amendments had not been made. The question still remained unanswered, what laws were in force. It appeared upon tracing the matter further back, that an act was passed on the 28th *January* 1777, intitled "An act to revive and put in force "such and so much of the late laws of the province of *Penn*- "*sylvania*, as is judged necessary to be in force in this com-

* This important document is here inserted at the request of the judges of the Supreme Court. In many respects it deserves to be placed by the side of judicial decisions, being the result of very great research and deliberation by the judges, and of their united opinion. It may not perhaps be considered as authoritative as judicial precedent; but it approaches so nearly to it, that a safer guide in practice, or a more respectable, not to say decisive, authority in argument, cannot be wanted by the profession.

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"monwealth." In this act it is provided, that the common law, nd such of the statute laws of *England* as have been heretofore in force in the said province, shall be in force, except as is hereafter excepted. The exception relates to the oath of allegiance to the king of *Great Britain*, the acknowledgment of any authority in the heirs of *William Penn* the first proprietary, the laws ascertaining the number of members of assembly in any county, the time of election and qualification of electors, the *English* statutes relating to treason or misprision of treason, and such laws or acts of assembly as declared, ordered, or directed, any thing inconsistent with the then existing constitution of the commonwealth.

Still the point remained open—what *English* statutes were in force in *Pennsylvania?* It became necessary therefore to mount up to the first sources of information, the charter granted to *William Penn*, and the general principles of colonization.

It is provided by the charter, that the laws for the regulating and governing of property, as well for the descent and enjoyment of lands, as likewise for the enjoyment and succession of goods and chattels, and likewise as to felonies, within the said province, shall be and continue the same as they shall be for the time being, by the general course of the law in the kingdom of *England*, until the said laws shall be altered by the said *William Penn*, his heirs or assigns, and by the freemen of the said province, their delegates or deputies, or the greater part of them. Notwithstanding the generality of these expressions, it has always been held, that many of the *English* laws, relating both to property and to felonies, would have been improper for the state of things in an infant colony; and accordingly they were never practically extended here. It is the true principle of colonization, that the emigrants from the mother country carry with them such laws as are useful in their new situation, and none other. A multitude of *English* statutes, relating to the king's prerogative, the rights and privileges of the nobility and clergy, the local commerce and revenue of *England*, and other subjects unnecessary to enumerate, were improper to be extended to *Pennsylvania*. In order to execute the duty required of them, it was necessary for the judges to examine

the code of *English* statute law from the beginning to the time of the settlement of *Pennsylvania;* and to weigh deliberately which of them were proper to be adopted. But this was not all. It was essential that our own statute book should be examined, to see in what cases the *English* law had been altered, or in what cases it had been expressly extended here. Wherever our own legislature had enacted a law on the same subject on which an *English* statute was to be found, it has been supposed that the *English* statute had no force here, even though it contained more extensive provisions than our own act of assembly; because it was reasonable to presume, that our assembly were acquainted with the *English* statute, and designedly omitted some of its provisions.

Besides these inquiries, it was necessary to ascertain, what had been the decisions of our own courts, respecting the extension of *English* statutes. This was no easy task, as we have no printed reports prior to our revolution, of cases determined in our courts of justice. Of course these decisions are only to be known by tradition, or manuscript notes in the possession of the gentlemen of the bar, or the judges.

With respect to *English* statutes enacted since the settlement of *Pennsylvania*, it has been assumed as a principle, that they do not extend here, unless they have been recognized by our acts of assembly, or adopted by long continued practice in courts of justice. Of the latter description there are very few, and those, it is supposed, were introduced from a sense of their evident utility. As *English* statutes they had no obligatory force, but from long practice they may be considered as incorporated with the law of our country.

Having endeavoured to ascertain the *English* statutes which were in force, the judges proceeded to the second part of the subject, the consideration of which of these statutes were proper to be incorporated with our own law. They felt that this part of their task, though very honourable, was very arduous, and in executing it, they have thought themselves bound to proceed with great caution. In works which consist in the alteration of long established usages, it is safer to do too little than too much. The most experienced builder cannot always calculate the exact effect of removing a stone. If further alterations should be necessary, it is always com-

1808.

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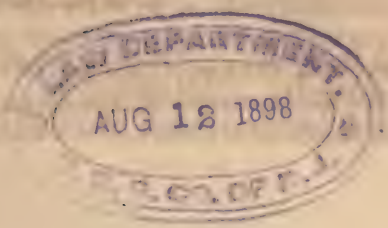
petent to the legislature to make them. It will be found by the report, that in a number of cases, the repeal of *English* statutes is recommended. In a number of others which appeared doubtful, it was thought best to leave them for further experience.

In perusing the statutes referred to in the report, the legislature will perceive, that in many of them the language is uncouth, and unsuited to our present form of government. In many of them too, they will find here and there a sentence, not properly applicable to any other country than *England*. There is no other way of curing these defects, than by reenacting the substance of these statutes in language suitable to our present condition, which might be attended with the additional advantage of simplifying the statute law, by reducing into one, several acts passed on the same subject. This would be a work of labour. Something of the kind has been done in the states of *Virginia* and *New York*, but it is believed that several years were employed in the performance.

From the outline which has been drawn, the legislature will easily perceive the difficulties attending the report now presented to them, and their candor will induce them to bear in mind, that it has been executed during the short intervals of official occupation. The judges dare not flatter themselves, that the performance approaches to perfection. They trust, however, that it will not be found more defective than might reasonably be expected.

WM. TILGHMAN.
J. YEATES.
THOMAS SMITH.
H. H. BRACKENRIDGE.

December 14, 1808.



3b 599
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53 484
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70 318
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104 580

REPORT

Of the Judges of the Supreme Court of Pennsylvania, of the English statutes which are in force in the commonwealth of Pennsylvania; and of those of the said statutes which, in their opinion, ought to be incorporated into the statute laws of the said commonwealth.

N. B. Ruffhead's edition of the English statutes at large, is referred to in this Report. The opinion of the judges is expressed under the title of each statute, whether or not the same ought to be incorporated.

Book and Page.	Year and Reign.	Titles of the Statutes.	1808.
1 Ruffhead 3	9th Henry III. chap. 7.	"A widow shall have her "marriage, inheritance and "quarantine." That part only of this statute is in force which provides, that a widow shall tarry in the chief house of her husband forty days after her husband's death, within which days her dower shall be assigned her. *To be incorporated.*	REPORT of the JUDGES.
Id. 9	9th Henry III. chap. 34.	"In what only case a wo- "man shall have an appeal of "death." *Not to be incorporated.*	
Id. 16	20th Henry III. chap. 1.	"A woman shall recover "damages in a writ of dower." *To be incorporated.*	
Id. 16	20th Henry III. chap. 2.	"Widows may bequeath "the crop of their lands." *To be incorporated.*	
Id. 16	20th Henry III. chap. 3.	"Inquiry and punishment "of redisseisin." *To be incorporated.*	

1808.	Book and Page.	Year and Reign.	Titles of the Statutes.
Report of the Judges.	1 Ruffhead 19	20th Henry III. chap. 9.	"He is a bastard that is "born before the marriage of "his parents." *To be incorporated.*
	Id. 20	21st Henry III.	"The day of the Leap "Year, and the day before, "shall be holden for one day." *To be incorporated.*
	Id. 31	52d Henry III. chap. 4.	"A distress shall not be "driven out of the county, "and it shall be reasonable." *To be incorporated.*
	Id. 35	52d Henry III. chap. 8.	"The punishment of those "who commit redisseisin." *To be incorporated.*
	Id. 35	52d Henry III. chap. 13.	"After issue joined there "shall be but one essoin or "one default." *Not to be incorporated.*
	Id. 36	52d Henry III. chap. 15.	"In what places distresses "shall not be taken." *To be incorporated.*
	Id. 37	52d Henry III. chap. 17.	"The authority and duty "of guardians in socage." *To be incorporated.*
	Id. 39	52d Henry III. chap. 29.	"In what case a writ of "entry sur disseisin in the "post doth lie." *To be incorporated.*
	Id. 43	3d Edward I. chap. 9.	"All men shall be ready to "pursue felons." That part only of this statute is in force which provides, that "all, generally, shall be "ready at the commandment "and summons of sheriffs, and "at the cry of the country, to

Book and Page.	Year and Reign.	Titles of the Statutes.	1808.
1 Ruffhead 43	3d Edward I. chap. 9.	"pursue and arrest felons, "where any need is." *To be incorporated.*	REPORT of the JUDGES.
Id. 54	3d Edward I. chap. 40.	"Voucher to warranty and "counter pleading of voucher." *To be incorporated.*	
Id. 56	3d Edward I. chap. 42.	"Certain actions, wherein "after appearance the tenant "shall not be essoined." *Not to be incorporated.*	
Id. 56	3d Edward I. chap. 43.	"There shall be no fourcher by essoin." *Not to be incorporated.*	
Id. 56	3d Edward I. chap. 44.	"In what case, essoin *ultra* "*mare* shall not be allowed." *Not to be incorporated.*	
Id. 57	3d Edward I. chap. 47.	"In what case the non-age "of the heir of the disseisor "or disseisee, shall not prejudice." The whole of this statute is in force, except those parts which relate to prelates, men of religion, and writs of attaint. *To be incorporated.*	
Id. 58	3d Edward I. chap. 49.	"The tenant's plea in a "writ of dower." *To be incorporated.*	
Id. 60	4th Edward I. statute 2d.	"Concerning the duty of a "coroner. This statute is in force, except those parts which relate to the coroner's duty in the following points, viz: making inquiry as to the property of any person, or seizing the property of any person; treasure	

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REPORT of the JUDGES.	1 Ruffhead 60	4th Edward I. statute 2d.	that is found; appeal of rape or of wounds, or any other appeals; deodands, and wrecks of the sea; and also except that part which provides, that land shall remain in the king's hands, until the lords of the fee have made fine for it. *To be incorporated.*
	Id. 65	6th Edward I. chap. 1.	"Several actions wherein "damages shall be recover- "ed." *To be incorporated.*
	Id. 65	6th Edward I. chap. 2.	"In what case non-age of "the plaintiff shall not stay "an inquest." *To be incorporated.*
	Id. 65	6th Edward I. chap. 3.	"An alienation of land by "the tenant by the courtesy "with warranty, shall be "void." *To be incorporated.*
	Id. 66	6th Edward I. chap. 5.	"Several tenants against "whom an action of waste is "maintainable." The whole of this statute is in force, except that part which relates to waste in the time of wardship, which is not applicable to this country. *To be incorporated.*
	Id. 66	6th Edward I. chap. 6.	"Where divers heirs shall "have one assize of Mort "d'Ancestor." *To be incorporated.*
	Id. 68	6th Edward I. chap. 10.	"The husband and wife "being impleaded, shall not "fourch by essoin." *Not to be incorporated.*

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1 Ruffhead 69	6th Edward I. chap. 13.	"No waste shall be made, "hanging a suit for the land." *To be incorporated.*	
Id. 78	13th Edward I. stat. 1. chap. 1.	"In gifts in tail the donor's "will shall be observed. The "form of a formedon." This statute is in force except such part as has been altered by an act of assembly passed 27th January 1749, (old style) intitled "An act for barring estates tail," and another act passed 16th January, 1799, intitled "An act to facilitate the barring of intails." *To be incorporated.*	
Id. 81	13th Edward I. stat. 1. chap. 3.	"A cui in vita for the wife. "When a wife or he in rever- "sion shall be received." *To be incorporated.*	
Id. 82	13th Edward I. stat. 1. chap. 4.	"Where the wife shall be "endowable of lands recover- "ed against her husband.— "Where the heir may avoid a "dower recovered. A remedy "for particular tenants losing "by default." This statute is in force, except that part which relates to proceedings in a writ of right. *To be incorporated.*	
Id. 86	13th Edward I. stat. 1. chap. 6.	"The penalty if a tenant "impleaded voucheth, and "the vouchee denieth his war- "ranty." *To be incorporated.*	
Id. 86	13th Edward I. stat. 1. chap. 7.	"Admeasurement of dow- "er for the guardian and the	

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Report of the Judges.	1 Ruffhead 86	13th Edward I. stat. 1. chap. 7.	"heir, and the process there-"in." *To be incorporated.*
	Id. 90	13th Edward I. stat. 1. chap. 11.	"The masters' remedy "against their servants, and "other accountants." *To be incorporated.*
	Id. 91	13th Edward I. stat. 1. chap. 12.	"The appellant being ac-"quitted, the appellor and "abettors shall be punished. "There shall be no essoin for "the appellor." *Not to be incorporated.*
	Id. 92	13th Edward I. stat. 1. chap. 14.	"The process in an action "of waste. A writ to inquire "of waste." *To be incorporated.*
	Id. 92	13th Edward I. stat. 1. chap. 15.	"An infant eloined may "sue by prochein amy." *To be incorporated.*
	Id. 93	13th Edward I. stat. 1. chap. 17.	"In what case essoin de "malo lecti doth lie, and "where not." *Not to be incorporated.*
	Id. 94	13th Edward I. stat. 1. chap. 20.	"The tenant's answer in a "writ of cosinage, aiel, and "besaiel." *To be incorporated.*
	Id. 94	13th Edward I. stat. 1. chap. 22.	"Waste maintainable by "one tenant in common a-"gainst another." *To be incorporated.*
	Id. 95	13th Edward I. stat. 1. chap. 23.	"Executors may have a "writ of account." *To be incorporated.*
	Id. 95	13th Edward I. stat. 1. chap. 24.	"A writ of nusance of a "house &c. levied and aliened

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1 Ruffhead 95	13th Edward I. stat. 1. chap. 24.	"to another. A quod per- "mittat, and juris utrum, for "a parson of a church. In "like cases, like writs be "grantable." This statute is in force, except those parts which relate to ecclesiastical persons. *To be incorporated.*	REPORT of the JUDGES.
Id. 95	13th Edward I. stat. 1. chap. 25.	"Of what things an assize "shall lie. Certificate of as- "size. Attachment in an as- "size." This statute is in force, except that part which gives the remedy by assize in cases of keeping of parks, woods, forests, chases, warrens, gates, and other bailiwicks and offices, in fee. Also that part which gives an immediate remedy by assize, in case any person holding land for term of years, aliens the same in fee, and by such alienation the freehold is transferred to the feoffee. Also that part which authorizes the sheriff to take an ox for his fee. *To be incorporated.*	
Id. 97	13th Edward I. stat. 1. chap. 26.	"Who may bring a writ of "redisseisin, and the punish- "ment of the offender there- "in." *To be incorporated.*	
Id. 97	13th Edward I. stat. 1. chap. 27.	"Essoin after inquest, but "none after day given prece "partium." *Not to be incorporated.*	
Id. 98	13th Edward I. stat. 1. chap. 30.	"The authority of justices "of Nisi Prius. Adjourn- "ment of suits. Certain writs	

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REPORT of the JUDGES.	1 Ruffhead 98	13th Edward I. stat. 1. chap. 30.	"that be determinable in their "proper counties. A jury "may give their verdict at "large. None but which were "summoned shall be put in "assizes or juries." The following parts only of this statute are in force: Sect. 3, "and when such inquests be "taken, they shall be returned "into the bench and there shall "judgment be given, and there "they shall be inrolled." "The justices of Nisi Prius "shall have clerks, to inroll "all pleas pleaded before "them." "The said justices "shall not compel the jurors "to say precisely whether it "be a disseisin or not, so that "they do shew the truth of the "deed, and require aid of the "said justices. But if they, "of their own head, will say "that it is a disseisin, their "verdict shall be admitted "at their own peril." *To be incorporated.*
Id.	99	13th Edward I. stat. 1. chap. 31.	"An exception to a plea "shall be sealed by the jus- "tices." *To be incorporated.*
Id.	101	13th Edward I. stat. 1. chap. 34.	"It is felony to commit a "rape. A married woman "elopeth with an avowterer. "The penalty for carrying a "nun from her house." That part only of this statute is in force, which enacts, that "if a wife willingly leave "her husband and go away, "and continue with her avow- "terer, she shall be barred "forever of action to demand

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1 Ruffhead 101	13th Edward I. stat. 1. chap. 34.	"her dower that she ought to "have of her husband's lands, "if she be convicted thereup- "on, except that her husband "willingly reconcile her, and "suffer her to dwell with him, "in which case she shall be "restored to her action." *To be incorporated.*	REPORT of the JUDGES.
Id. 104	13th Edward I. stat. 1. chap. 39.	"The manner to deliver "writs to the sheriff to be ex- "cuted. The sheriff return- "eth 'a liberty,' where none "is. Returning of issues. Re- "sistance of execution of pro- "cess." Those parts only of this statute are in force which define "what shall be accounted "issues," direct the punishment of the sheriff for false returns, give authority to the sheriff to do certain things in case of resistance of the execution of process, and direct the punishment of those who resist the execution of process. *To be incorporated.*	
Id. 106	13th Edward I. stat. 1. chap. 40.	"A woman's suit shall not "be deferred by the minority "of the heir." *To be incorporated.*	
Id. 109	13th Edward I. stat. 1. chap. 45.	"The process of execution "of things recorded within "the year or after." *To be incorporated.*	
Id. 123	18th Edward I. stat. 2d.	"Statute of Quo Warran- "to." *To be incorporated.*	

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REPORT of the JUDGES.	1 Ruffhead 123	18th Edward I. stat. 3d.	"Another new statute of "Quo Warranto." *To be incorporated.*
	Id. 124	18th Edward I. stat. 4th.	"The manner of levying "fines." *To be incorporated.*
	Id. 125	20th Edward I. stat. 1st.	"The statute of vouchers." *To be incorporated.*
	Id. 126	20th Edward I. stat. 2d.	"A statute of waste." *To be incorporated.*
	Id. 127	20th Edward I. stat. 3d.	"Statute de defensione "juris." *To be incorporated.*
	Id. 134	27th Edward I. stat. 1. chap. 1.	Statute "de finibus leva- "tis." *To be incorporated.*
	Id. 139	28th Edward I. stat. 2d.	"A statute for persons ap- "pealed." *Not to be incorporated.*
	Id. 145	28th Edward I. stat. 3. chap. 16.	"What shall be done with "them that make false re- "turns." *To be incorporated.*
	Id. 149	33d Edward I. stat. 2d.	"Who be conspirators, and "who be champertors." That part only of this statute is in force, which relates to "conspirators," and from that part is to be excepted what relates to "stewards and "bailiffs of great lords." *To be incorporated.*
	Id. 150	33d Edward I. stat. 3.	"The statute of champer- "ty." That part only of this sta-

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1 Ruffhead 150	33d Edward I. stat. 3.	tute is in force, which relates to conspirators. *To be incorporated.*
Id. 151	33d Edward I. stat. 4.	"An ordinance for in-"quests." *To be incorporated.*
Id. 152	33d Edward I. stat. 6.	"An ordinance for measu-"ring of land. *To be incorporated.*
Id. 153	34th Edward I. stat. 1st.	"The statute de conjunc-"tim feoffatis." This statute is in force, except those parts which relate to writs of "juris utrum" and "indicavit." *To be incorporated.*
Id. 174	12th Edward II. stat. 1. chap. 1.	"Tenants in assize of no-"vel disseisin may make at-"torneys." *To be incorporated.*
Id. 175	12th Edward II. stat. 1. chap. 4.	"Justices of Nisi Prius "shall record nonsuits, de-"faults," &c. Only those parts of this statute are in force, which are distinguished by the numbers 1, 2 and 6. *To be incorporated.*
Id. 175	12th Edward II. stat. 1. chap. 5.	"An indenture shall be "made between the sheriff "and bailiff of liberty of eve-"ry return." That part only of this statute is in force, which obliges sheriffs and other officers, to sign their names to the return of writs. *To be incorporated.*

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REPORT of the JUDGES.	1 Ruffhead 177	12th Edward II. stat. 2d.	"The statute of essoins." *Not to be incorporated.*
	Id. 178	15th Edward II.	"A statute concerning "fines." This statute is in force, except that part which relates to the admission of attorneys. *To be incorporated.*
	Id. 201	2d Edward III. chap. 16.	"Nisi Prius may be granted, as well at the tenant's "suit, as at the demandant's." *To be incorporated.*
	Id. 201	2d Edward III. chap. 17.	"A writ of deceit shall be "maintainable in case of garnishment, in plea of land." *To be incorporated.*
	Id. 202	4th Edward III. chap. 2.	"The authority of justices "of assize, jail delivery, and "of the peace." Only those parts of this statute are in force, which are distinguished by the numbers 6 and 7. *To be incorporated.*
	Id. 203	4th Edward III. chap. 7.	"Executors shall have an "action of trespass, for a "wrong done to their testator." *To be incorporated.*
	Id. 210	5th Edward III. chap. 10.	"The punishment of a juror that is ambidexter, and "taketh money." *To be incorporated.*
	Id. 224	14th Edward III. stat. 1. chap. 6.	"A record which is defective by misprision of a clerk, "shall be amended." *To be incorporated.*

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1 Ruffhead 229	14th Edward III. stat. 1. chap. 16.	"Before what persons Nisi "Prius may be granted." That part only of this statute is in force, which enacts that "the justices of Nisi "Prius shall have power to "give judgment on verdicts "of assize, and upon nonsuits "and defaults, and return the "same to the court in bank." *To be incorporated.*
Id. 230	14th Edward III. stat. 1. chap. 18.	"If the tenant will vouch "to warranty a dead man, "the demandant may aver "that he is dead." *To be incorporated.*
Id. 254	25th Edward III. stat. 2.	"Of those that be beyond "sea." Only that part of this statute is in force which is distinguished by the number 5. *To be incorporated.*
Id. 262	25th Edward III. stat. 5. chap. 3.	"No indictor shall be put "upon the inquest of the par-"ty indicted." *To be incorporated.*
Id. 263	25th Edward III. stat. 5. chap. 5.	"Executors of executors "shall have the benefit and "charge of the first testator." *To be incorporated.*
Id. 266	25th Edward III. stat. 5. chap. 16.	"The exception of non-te-"nure of parcel, shall not "abate the whole writ." *To be incorporated.*
Id. 288	28th Edward III. chap. 13.	"The warranty of packing "of wool shall be put out. An "inquest shall be de medie-"tate linguæ, where an alien "is party." That part only of this sta-

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Report of the Judges.	1 Ruffhead 288	28th Edward III. chap. 13.	tute is in force, which gives an inquest de medietate linguæ. *Not to be incorporated.*
	Id. 293	31st Edward III. stat. 1. chap. 11.	"To whom the ordinary "may commit the adminis- "tration of the goods of him "that dieth intestate. The be- "nefit and charge of an ad- "ministrator." This statute is in force, except that part which relates to expending money for the soul of the deceased. *To be incorporated.*
	Id. 299	34th Edward III. chap. 1.	"What sort of persons shall "be justices of peace, and "what authority they shall "have." Those parts only of this statute are in force, which are distinguished by the numbers 2, 3, 4, 5, 6 and 10. *To be incorporated.*
	Id. 301	34th Edward III. chap. 8.	"The penalty of a juror "taking reward to give his "verdict." *To be incorporated.*
	Id. 303	34th Edward III. chap. 16.	"Non-claim of fines shall "be hereafter no bar." *To be incorporated.*
	Id. 320	38th Edward III. stat. 1. chap. 12.	"The punishment of a ju- "ror taking reward to give "verdict, and of embraceors." *To be incorporated.*
	Id. 332	50th Edward III. chap. 6.	"Fraudulent assurances of "land or goods, to deceive "creditors, shall be void." *To be incorporated.*

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1 Ruffhead 336	1st Richard II. chap. 9.	"A feoffment of lands or "gift of goods for mainte- "nance, shall be void. An as- "size is maintainable against "the pernor of the profits of "land." This statute is in force, except such parts as are altered by the statutes of 4th of Henry 4th, chap. 7., 11th of Henry 6th, chap. 3., 4th of Henry 7th, chap. 24., and 27th of Henry 8th, chap. 10. *To be incorporated.*	REPORT of the JUDGES.
Id. 337	1st of Richard II. chap. 12.	"A prisoner by judgment "shall not be let at large. "Confession of a debt to the "king to delay another's exe- "cution." This statute is in force, except such parts as relate to confessions of debts to the king. *To be incorporated.*	
Id. 359	6th of Richard II. stat. 1. chap. 3.	"In which courts writs of "nuisance called vicontiels, "shall be pursued." So much of this statute is in force, as gives the plaintiff an election to have a writ of nuisance, in nature of an assize. *To be incorporated.*	
Id. 371	8th of Richard II. chap. 4.	"The penalty if a judge or "clerk make a false entry, "rase a roll, or change a ver- "dict." *To be incorporated.*	
Id. 372	9th of Richard II. chap. 3.	"A writ of error, or attaint, "maintainable by him in re- "version." So much only of this statute	

1808.	Book and Page.	Year and Reign.	Titles of the Statutes.
Report of the Judges.	1 Ruffhead 372	9th of Richard II. chap. 3.	is in force, as gives a writ of error to him in reversion. *To be incorporated.*
	Id. 390	13th Richard II. stat. 1. chap. 17.	"Where he in the reversion may be received, in a "suit commenced against the "particular tenant." *To be incorporated.*
	Id. 400	15th Richard II. chap. 2.	"The duty of justices of "peace when any forcible en- "try is made into lands." So much only of this statute is in force, as relates to forcible entry and detainer, or either of them. *To be incorporated.*
	Id. 437	2d Henry IV. chap. 7.	"In what case the plaintiff "shall not be nonsuit, if the "verdict pass against him." *To be incorporated.*
	Id. 446	4th Henry IV. chap. 7.	"The disseisee shall have "an assize against the dissei- "sor taking the profits." *To be incorporated.*
	Id. 460	5th Henry IV. chap. 14.	"Inrolling of writs in the "Common Pleas, whereupon "fines be levied." That part only of this statute is in force which directs, that all the writs of covenant, and all other writs whereupon fines shall be levied, with the writs of dedimus potestatem, if any, with all knowledges and notes of the same, shall be inrolled in a roll, to be of record for ever. *To be incorporated.*
	Id. 483	1st Henry V. chap. 5.	"In which original writs

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1 Ruffhead 483	1st Henry V. chap. 5.	"additions of the defendant's "name shall be put." So much of this statute is in force as requires an addition of the defendant's estate, or degree, or mystery, and of the county in which the defendant is, or in which he is conversant. *To be incorporated.*	REPORT of the JUDGES.
Id. 513	9th Henry V. chap. 4.	"The justices may amend "defaults in records or pro- "cess after judgment given." *To be incorporated.*	
Id. 534	4th Henry VI. chap. 3.	"Justices in certain cases "may amend their records "according to former sta- "tutes." *To be incorporated.*	
Id. 545	8th Henry VI. chap. 9.	"The duty of justices of "peace, where land is enter- "ed upon or detained with "force." *To be incorporated.*	
Id. 550	8th Henry VI. chap. 12.	"No judgment or record "shall be reversed, for any "writ, process, &c. rased. "What defects in records "may be amended by the "judges, and what not." Only the 1st and 2d sections of this statute are in force. *To be incorporated.*	
Id. 553	8th Henry VI. chap. 15.	"The justices may in cer- "tain cases amend defaults in "records." *To be incorporated.*	
Id. 557	8th Henry VI. chap. 29.	"An inquest shall be de	

1808.	Book and Page.	Year and Reign.	Titles of the Statutes.
Report of the Judges.	1 Ruffhead 557	8th Henry VI. chap. 29.	"medietate linguæ, where an "alien is party." *Not to be incorporated.*
	Id. 569	11th Henry VI. chap. 2.	"The penalty where a she- "riff is named a disseisor in "an assize." *To be incorporated.*
	Id. 569	11th Henry VI. chap. 3.	"An assize, &c. maintain- "able against the pernor of "the profits." *To be incorporated.*
	Id. 571	11th Henry VI. chap. 5.	"The remedy where a te- "nant granteth over his es- "tate, taketh the profits, and "committeth waste." *To be incorporated.*
	2 Ruffhead 56	1st Richard III. chap. 7.	"Who shall be bound by a "fine levied before the jus- "tices of the Common Pleas, "and proclamations made "thereon." This statute is in force, except such parts as are altered by the statute of the 31st of Elizabeth, chap. 2d. *To be incorporated.*
	Id. 68	3d Henry VII. chap. 1.	"The authority of the court "of Star-chamber, where one "inquest shall inquire of the "concealment of another. A "coroner's duty, after a mur- "der committed. A justice "of peace shall certify his re- "cognisances, &c." Only those parts of this statute are in force, which are distinguished by the numbers from 6 to 19, both inclusive, and by the number 26. *To be incorporated.*

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2 Ruffhead 69	3d Henry VII. chap. 3.	"Justices of peace may let "prisoners to bail. The she- "riff shall certify the names "of all his prisoners at the "jail delivery." Only that part of this statute is in force which is distinguished by the number 5. *To be incorporated.*
Id. 70	3d Henry VII. chap. 4.	"All deeds of gift made to "defraud creditors, shall be "void." *To be incorporated.*
Id. 72	3d Henry VII. chap. 10.	"Costs, &c. awarded to the "plaintiff, where the defen- "dant sueth a writ of error." *To be incorporated.*
Id. 78	4th Henry VII. chap. 20.	"Actions popular, prose- "cuted by collusion, shall be "no bar to those which be "pursued with good faith." *To be incorporated.*
Id. 79	4th Henry VII. chap. 24.	"How often a fine levied "in the Common Pleas shall "be read and proclaimed, and "who then shall be bound "thereby." *To be incorporated.*
Id. 85	11th Henry VII. chap. 12.	"A mean to help and speed "poor persons in their suits." *To be incorporated.*
Id. 89	11th Henry VII. chap. 20.	"Certain alienations made "by the wife, of the lands of "her deceased husband, shall "be void." *To be incorporated.*
Id. 105	19th Henry VII. chap. 20.	"Writs of error." *To be incorporated.*

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Report of the Judges.	2 Ruffhead 120	5th Henry VIII. chap. 6.	"An act concerning sur-"geons, to be discharged of "quests and other things." So much only of this statute is in force, as discharges surgeons from service on juries. *To be incorporated.*
Id.	126	7th Henry VIII. chap. 4.	"An act concerning avow-"ries for rents and services." This statute is in force, except those parts that relate to writs of quare impedit, and advowsons. *To be incorporated.*
Id.	137	21st Henry VIII. chap. 3.	"Plaintiffs in assize may "abridge their plaints." *To be incorporated.*
Id.	138	21st Henry VIII. chap. 5.	"What fees ought to be "taken for probate of testa-"ments." That part only of this statute is in force, which relates to the persons to whom administration is to be granted. *To be incorporated.*
Id.	141	21st Henry VIII. chap. 7.	"Servants embezzling their "master's goods, to the value "of forty shillings, or above, "shall be punished as felons." This statute after having been repealed, was revived by the statute of 5th Eliz. chap. 10. *To be incorporated.*
Id.	147	21st Henry VIII. chap. 15.	"Fermors shall enjoy their "leases against recoveries by "feigned titles, &c." *To be incorporated.*

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2 Ruffhead 173	23d Henry VIII. chap. 15.	"An act that the plaintiff "being nonsuited, shall yield "damages to the defendant, "in actions personal, by the "discretion of the justices." *To be incorporated.*
Id. 176	24th Henry VIII. chap. 8.	"An act where defendant "shall not recover any costs." *Not to be incorporated.*
Id. 226	27th Henry VIII. chap. 10.	"An act concerning uses "and wills." Only the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 9th, and 10th sections of this statute are in force. *To be incorporated.*
Id. 261	31st Henry VIII. chap. 1.	"For joint-tenants and te- "nants in common." *To be incorporated.*
Id. 277	32d Henry VIII. chap. 5.	"For the continuation of "debts upon execution." *To be incorporated.*
Id. 291	32d Henry VIII. chap. 28.	"Lessees to enjoy the farm "against tenants in tail." This statute is in force, except the 4th, 5th, and 8th sections. *To be incorporated.*
Id. 293	32d Henry VIII. chap. 30.	"Mispleadings. Jeofails." This statute is in force, except the 2d and 3d sections. *To be incorporated.*
Id. 294	32d Henry VIII. chap. 32.	"Joint-tenants for term of "life or years." *To be incorporated.*
Id. 294	32d Henry VIII. chap. 33.	"An act that wrongful dis- "seisin is no descent in law." *To be incorporated.*

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REPORT of the JUDGES.	2 Ruffhead 294	32d Henry VIII. chap. 34.	"Concerning grantees of "reversions to take advan- "tage of the conditions to be "performed by lessees." This statute is in force, except such parts as relate to the king of England and his grantees. *To be incorporated.*
Id.	296	32d Henry VIII. chap. 36.	"For the exposition of "fines." This statute is in force, except the 3d and 4th sections. *To be incorporated.*
Id.	297	32d Henry VIII. chap. 37.	"For recovery of arrear- "ages of rents, by executors "of tenant in fee simple." This statute is in force, except the 2d section. *To be incorporated.*
Id.	375	37th Hen. VIII. chap. 8.	"The act, that any indict- "ment lacking these words, "vi et armis, shall be good." This act is in force, except the 2d section. *To be incorporated.*
Id.	422	2d & 3d Ed. VI. chap. 24.	"An act for trial of mur- "ders and felonies commit- "ted in several counties." *To be incorporated.*
Id.	461	1st Mary, session 2d. chap. 7.	"An act touching procla- "mations upon fines." *To be incorporated.*
Id.	484	1st and 2d Philip and Mary, chap. 12.	"An act for the impound- "ing of distresses." Only the 1st section of this statute is in force. *To be incorporated.*

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2 Ruffhead 484	1st and 2d Philip and Mary, chap. 13.	"An act concerning bail-"ment of persons." The 2d, 3d, 4th and 5th sections only are in force. *To be incorporated.*
Id. 493	2d and 3d Philip and Mary, chap. 10.	"An act to take the exa-"mination of prisoners sus-"pected of any manslaughter "or felony." *To be incorporated.*
Id. 549	5th Elizabeth, chap. 9.	"An act for punishment of "such as shall procure or "commit any wilful perjury." This statute is in force, except the 10th, 11th, 12th, and 13th sections, which are inapplicable to this commonwealth, and except the punishment by imprisonment, and paying of money, which is altered by our act of assembly for reforming the penal laws. *To be incorporated.*
Id. 571	8th Elizabeth, chap. 2.	"An act for avoiding of "wrongful vexation, touching "the writ of latitat." Only the 1st, 2d, 4th and 5th sections of this statute are in force. *To be incorporated.*
Id. 588	13th Elizabeth, chap. 5.	"An act against fraudu-"lent deeds, alienations, &c." *To be incorporated.*
Id. 607	14th Elizabeth, chap. 8.	"An act for the avoiding "of recoveries suffered by "collusion by tenants for term "of life, and such others." *To be incorporated.*
Id. 621	18th Elizabeth, chap. 14.	"An act for reformation of "jeofails."

1808.	Book and Page.	Year and Reign.	Titles of the Statutes.
Report of the Judges.	2 Ruffhead 621	18th Elizabeth, chap. 14.	This statute is in force, except the 3d section. *To be incorporated.*
	Id. 626	23d Elizabeth, chap. 3.	"An act for the reformation of errors in fines and recoveries." This statute is in force, except the 6th, 7th, 8th, 9th and 10th sections. *To be incorporated.*
	Id. 636	27th Elizabeth, chap. 4.	"An act against covinous and fraudulent conveyances." This statute is in force, except the 7th, 8th, 9th, 10th, 11th and 12th sections. *To be incorporated.*
	Id. 638	27th Elizabeth, chap. 5.	"An act for furtherance of justice in case of demurrer and pleadings." *To be incorporated.*
	Id. 659	31st Elizabeth, chap. 2.	"An act for abridging of proclamations upon fines to be levied at the common law." *To be incorporated.*
	Id. 668	31st Elizabeth, chap. 11.	"An act of explanation or declaration of the statute of Octavo regis Henrici VI. concerning forcible entries, the indictments thereupon found." *To be incorporated.*
	Id. 712	43d Elizabeth, chap. 8.	"An act against fraudulent administration of intestate's goods." *To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
3 Ruffhead 52	3d James I. chap. 8.	"An act to avoid unnecessary delays of execution." *To be incorporated.*
Id. 68	4th James I. chap. 3.	"An act to give costs to the defendant, upon a nonsuit of the plaintiff or verdict against him." *To be incorporated.*
Id. 99	21st James I. chap. 13.	"An act for the further reformation of jeofails." *To be incorporated.*
Id. 100	21st James I. chap. 15.	"An act to enable judges and justices of the peace to give restitution of possession in certain cases." *To be incorporated.*
Id. 111	21st James I. chap. 24.	"An act for the relief of creditors against such persons as die in execution." *To be incorporated.*
Id. 192	12th Charles II. chap. 24.	"An act for taking away the court of wards and liveries, and tenures by capite, and by knight's service and purveyance, and for settling a revenue on his majesty in lieu thereof." Only the 8th and 9th sections of this statute are in force. *To be incorporated.*
Id. 215	13th Charles II. stat. 2. chap. 2.	"An act for the prevention of vexations and oppressions by arrests, and of delays in suits of law." This statute is in force, except certain parts which have a local object, and are therefore inapplicable to this commonwealth, and certain other

1808.	Book and Page.	Year and Reign.	Titles of the Statutes.
Report of the Judges.	3 Ruffhead 215	13th Charles II. stat. 2. chap. 2.	parts, which are altered by our acts of assembly, or the practice of our courts. *To be incorporated.*
	Id. 293	16th and 17th Charles II. chap. 8.	"An act to prevent arrests "of judgment, and supersc- "ding executions." This statute is in force, subject to the same exceptions as were mentioned with relation to the statute of 13th Charles II. stat. 2. chap. 2. *To be incorporated.*
	Id. 299	17th Charles II. chap. 8.	"An act for avoiding unne- "cessary suits and delays." *To be incorporated.*
	Id. 313	19th Charles II. chap. 6.	"An act for redress of in- "conveniencies by want of "proof of the deceases of per- "sons beyond the seas, or ab- "senting themselves, upon "whose lives estates do de- "pend." *To be incorporated.*
	Id. 357	22d and 23d Charles II. chap. 9.	"An act for laying imposi- "tions on proceedings at law." All that is unexpired of this statute, that is to say the 136th section "for prevention "of trivial and vexatious suits "in law," is in force. *To be incorporated.*
	Id. 394	30th Charles II. chap. 7.	"An act to enable creditors "to recover their debts of the "executors and administra- "tors of executors in their "own wrong." *To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.	1811.
3 Ruffhead 527	4th and 5th William & Mary, chap. 21.	"An act for delivering declarations to prisoners." *To be incorporated.*	REPORT of the JUDGES.
Id. 642	8th and 9th William III. chap. 11.	"An act for the better preventing frivolous and vexatious suits." *To be incorporated.*	
Id. 697	9th and 10th William III. chap. 15.	"An act for determining differences by arbitration." *To be incorporated.*	
4 Ruffhead 14	10th and 11th William III. chap. 16.	"An act to enable posthumous children to take estates as if born in their father's lifetime." *To be incorporated.*	
Id. 43	11th and 12th William III. chap. 6.	"An act to enable his majesty's natural born subjects to inherit the estate of their ancestors either lineal or collateral, notwithstanding their father or mother were aliens." *To be incorporated.*	
Id. 180	3d and 4th Anne, chap. 9.	"An act for giving like remedy upon promissory notes, as is now used upon bills of exchange, and for the better payment of inland bills of exchange." The 1st, 3d, 4th, and 8th sections of this statute are in force. *To be incorporated.*	
Id. 205	4th Anne, chap. 16.	"An act for the amendment of the law, and the better advancement of justice." The first 13 sections, and the 20th and 27th sections of this statute are in force. *To be incorporated.*	

1808.	Book and Page.	Year and Reign.	Titles of the Statutes.
REPORT of the JUDGES.	5 Ruffhead 201	5th George I. chap. 13.	"An act for the amendment "of writs of error, and for the "preventing the arresting or "reversing of judgments after "verdict." *To be incorporated.*
	6 Ruffhead 167	7th George II. chap. 20.	"An act for the more easy "redemption and foreclosure "of mortgages." The 1st and 3d sections of this statute are in force. *To be incorporated.*
	Id. 296	11th George II. chap. 19.	"An act for the more effec- "tual securing the payment of "rents, and preventing frauds "by tenants." The 14th and 15th sections of this statute are in force. *To be incorporated.*

There are several statutes, called statutes of *Mortmain*, one of which ("the statute de Religiosis") was passed in the 7th year of Edward I. statute the 2d, another in the 13th year of Edward I. chap. 32, another in the 15th year of Richard II. chap. 5, and another in the 23d year of Henry VIII. chap. 10. These statutes are in part inapplicable to this country, and in part applicable, and in force. They are so far in force, that all conveyances, either by deed or will, of lands, tenements, or hereditaments, made to a body corporate, or for the use of a body corporate, are void, unless sanctioned by charter or act of assembly. So also are all such conveyances void, made either to an individual, or to any number of persons associated, but not incorporated, if the said conveyances are for uses or purposes of a *superstitious* nature, and not calculated to promote objects of charity or utility.

To be incorporated.

WM. TILGHMAN.
J. YEATES.
THOMAS SMITH.
H. H. BRACKENRIDGE.

December 14, 1808.

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OF THE

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The supercargo of all the shipments *but one* on board a vessel, and having also the management of the vessel, joined with the captain in putting in a claim for the ship and entire cargo, on their being captured and libelled as prize; and upon the acquittal of that particular adventure, he received it subject to the payment of all the costs, expenses, and counsel fees, arising from the capture and trial, which he disbursed out of the proceeds. *Held* that he was intitled to an allowance of those costs &c., although the owner was in law chargeable only with a part of them. *Delaware Insurance Company* v. *Delaunie.* 295

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4. The agreement between shippers, owner and supercargo, after stating the proportions of the shippers, and the object of the shipment, proceeded thus: "The freight, which "is to be 25 per cent. on the sum "shipped, is to be paid in *Batavia*, "and invested in the said ship on "account of *D*" the owner. "The "commission which is to be 4 per "cent. on the investment is also to "be paid in *Batavia*, and invested "on account of *A*" the supercargo; "*but after the property of the shippers is all on board*." *Held* that neither *A* nor *D* was intitled to a preference in the loading of their goods on board the ship, and the ship being nearly full with the goods of the shippers, *A* and *D* must load in proportion to their interests. 329

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2. An appeal does not lie from the Common Pleas, to the Supreme Court. The act of 11th *March* 1809, which authorizes appeals and writs of error from and to the courts of the several counties, means that causes shall be removed by one or the other mode, according to the course of proceeding in the respective courts, namely by appeal from the Register's and Orphan's Courts, and by writ of error from the Quar-

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3. An application descriptive of the land, is to be preferred to one not descriptive of it, though such descriptive application is higher in number, provided due diligence is used in obtaining a survey. *Ib.*

4. If the holder of the preferable application does not put it into the surveyor's hands, and the holder of the inferior application does, the surveyor may make the survey on the inferior application; but if before the return of survey, the holder of the preferable application accounts for his delay, the surveyor *may* and *ought* to make the return for him. *Ib.*

5. After a return made in favour of the holder of an inferior application, the holder of the application originally intitled to a preference, may enter a caveat, and try his case before the board of property; who, if there has been no unreasonable delay, may order a patent to the caveator; and in case either party is dissatisfied, he may bring his case before a court of law, where the order of the board of property, is not considered as conclusive. *Ib.*

6. Applications which do not exclusively call for particular spots of land, are not efficacious to give a title, unless they are reduced to certainty by a survey. Later orders of survey, duly prosecuted, though equally undescriptive, will be intitled to a preference over them. 20

7. A shifted application is not a commencement of title until return of the survey made under it, except as against a person who has actual notice of the survey; and although the proprietor of a younger survey may have actual notice of the survey of the shifted application, yet if there is *laches* in the return of this survey, and in the mean time the younger survey is sold to a *bona fide* purchaser, without actual notice, he will hold the land. *Lessee of Bond* v. *Stroup.* 66

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2. Immediately after special bail is entered in compliance with a notice, either party is intitled to enter a rule of arbitration, though before the return day of the term of which the suit is docketed. And in all cases a suit is *entered* within the meaning of the arbitration law, from the moment it is placed on the docket of the prothonotary. *Hertzog* v. *Ellis*. 209

3. An award of arbitrators is a judgment of that court in which it is entered, from the time of its entry upon the docket, and as such subject to a writ of error. *Eberseli* v. *Krug*. 528

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1. If a creditor of *A* lays an attachment upon goods which appear as the property of *A*, but wherein *B* has nevertheless an interest, which he communicates to the creditor before the attachment is laid, the creditor is bound to refund *B* his proportion of the money recovered under the attachment, notwithstanding the judgment of a competent court decreed the whole to him as the property of *A*. *Bank of North America* v. *M'Call*. 338

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3. Stock of the Bank of the United States, which has been sold *bona fide*, and the certificate delivered to the purchaser with a power of attorney to transfer it upon the books of the bank, is not liable to attachment as the property of the vendor, although it is standing in his name on the books of the bank, at the time of the attachment. *The United States* v. *Vaughan*. 394

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A *capias* may issue for any cause of action whatever against a freeholder, who neglects to put in special bail upon notice. *Jack* v. *Shoemaker*. 280

COMMISSIONS.

A went as supercargo from *Philadelphia* to *Batavia*, under an agreement with the shippers, which so far as respected his compensation was thus: "The commission which "is to be four per cent. on the in- "vestment, is to be paid in *Batavia*, "and invested on account of *A*." *A* died in thirty-six hours after his arrival at *Batavia*, without having made any investment of the cargo. *Held* that he was intitled to a proportionate compensation, deducting from the whole commission of four per cent. what it would cost the shippers to complete the investment at *Batavia*. *Welsh* v. *Dusar*. 329

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3. A bond is a proper subject of a *donatio causa mortis*. 366

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3. A judgment against three defendants upon a submission to arbitration by one, is erroneous. *Studebacker* v. *Moore*. 124

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6. An award of arbitrators is a judgment of the court from the time of its entry on the docket, and subject to a writ of error. *Ebersoll* v. *Krug*. 528

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4. The declarations of a deputy surveyor, that he had made a certain survey under an order from the proprietaries, are not evidence, although the deputy was dead before the trial, and all his official papers had been accidentally burnt, and in addition to these circumstances, the warrant of acceptance recited that the survey had been made under such an order. *Lessee of Bonnet* v. *Devebaugh.* 175

5. The recitals in a warrant of acceptance are evidence against the proprietary, but not against persons claiming adversely to the survey, by a title commenced before the return of survey. *Ib.*

6. If the subscribing witness to a bond, is out of the jurisdiction of the court, and upon diligent inquiry no person can be found within the jurisdiction who can prove his handwriting, the handwriting of the obligor may be proved. *Clark* v. *Sanderson.* 192

7. The protest of the master of a vessel is evidence in an action of replevin by the owner of the cargo against the vendee of the captor. *Cheriot* v. *Foussat.* 227

8. A paper which is not evidence *per se* in a suit between the underwriter and the assured, does not become so for any purpose, in consequence of having been exhibited by the latter to the former as one of the preliminary proofs of loss; except the question be merely whether such a paper was exhibited. *Thurston* v. *Murray.* 326

9. *Quære* whether the acknowledgment of a deputy sheriff, of things done by him in the course of his office, is evidence against the sheriff? *Hecker* v. *Jarret.* 404

10. Where an account stated, deed, or other document, is offered in evidence to the jury, the court may either decide themselves that it is or is not sufficiently proved, and admit or reject it accordingly; or they may refer the evidence to the jury, instructing them to disregard the deed &c., unless they are satisfied with the proof of its execution. *Commissioners of Berks* v. *Ross.* 539

11. After the words laid in the declaration are proved, the plaintiff may give in evidence other words, actionable in themselves, and spoken since the suit brought, to shew the malice of the defendant. *Wallis* v. *Mease.* 546

12. Declarations of the grantor, at and immediately before the sealing and delivery of a deed, are admissible in evidence to shew that he did not intend to convey what might be nevertheless included within the description of the deed. *Lessee of Dinkle* v. *Marshall.* 587

EXCEPTIONS.

Exceptions to the report of auditors

in account render, are too late after a judgment *nisi* upon the report has become absolute by the expiration of the term in which it was entered. *Quære* whether such exceptions should not be taken before the auditors, and prior to the report. *Gratz* v. *Phillips.* 474

EXECUTOR.

1. The testator appointed *A*, *B* and *C* his executors, and gave them power to sell his land by the following clause: "*The executors, name-*"*ly* A, B, *and* C, *shall be impowered* "*to sell my land, and to give a good* "*right.* When my *debts* are paid, if "any thing should remain, my wife "shall keep &c." Two of the executors refused to act. *Held* that the third had authority to sell. *Lessee of Zebach* v. *Smith.* 69

2. There is nothing in the defalcation act of *Pennsylvania* to exclude a set-off either by or against an executor or administrator. *Murray* v. *Williamson.* 135

3. An executor in the state of *Pennsylvania* has always been a trustee for the next of kin, as to all the personal property of a testator not disposed of by his will. *Wilson* v. *Wilson.* 557

4. Money had and received will lie against an executor in his personal character, to recover a distributive portion of a testator's estate, not disposed of by his will, and which has come to the executor as trustee for the next of kin. *Ib.*

EXECUTION.

1. If execution is stayed by agreement of the parties, the "year and day" runs only from the time when such stay expires; and this, whether there is an entry of the *cesset* on the record, or it is a matter of private arrangement out of court. The court will take notice of such an agreement, though it is not on record. *Lessee of Dunlop* v. *Speer.* 169

2. Supposing a single judge of the Common Pleas to have a right to discharge a defendant who is in execution from that court, still if he does it without notice to the plaintiff, the proceeding is void, and the defendant may be retaken in execution. *Hecker* v. *Jarret.* 404

3. If a defendant upon being first taken in execution, omits to shew property upon which a levy may be made, and he is afterwards illegally discharged and retaken upon the same execution, an offer to shew property, is then too late. *Ib.*

4. Notwithstanding the acts of assembly which exempt the person of a debtor from execution if he has property sufficient for the debt, the plaintiff may take out a *ca. sa.* in the first instance, at his peril. 407

5. If special bail has been entered at the commencement of a suit, in a sum sufficient to secure the amount which has been awarded by arbitrators in the cause, it is not necessary for the defendant to enter special bail *de novo* to intitle himself to a stay of execution for thirty days under the acts of assembly. *Perlasca* v. *Spargella.* 427

FEES.

See SURVEYOR.

FRAUDS, ACT OF.

See ACT OF FRAUDS.

FREEHOLDER.

A capias may issue for any cause of action whatever against a freeholder, who neglects to put in special bail upon notice. *Jack* v. *Shoemaker.* 280

FREIGHT.

See INSURANCE, 7.

HABEAS CORPUS.

The habeas corpus act of 1785 extends to commitments under civil process. *Hecker* v. *Jarret.* 404

HEIR.

Heir is *nomen collectivum* in a will, if not in a deed, and the same as *heirs*. *Lessee of Hall* v. *Vandegrift.* 374

IMPLIED PROMISE.

An express agreement prevents the implication of a promise, which the law would otherwise make. *Duncan* v. *Keiffer.* 126

IMPROVEMENT.

1. *Quære* whether a person residing on one tract, can make a legal settlement by a *tenant* on another, so as to acquire a legal settlement right to it? *Lessee of Blaine* v. *Johnson.* 103

2. Title by settlement and improvement, though at different times it has been in some measure shaken, is now as well established as any species of title in *Pennsylvania*, and very often has been preferred to warrant, survey and patent. *Lessee of Bonnet* v. *Devebaugh.* 175

INDICTMENT.

An indictment for stealing bank notes generally, under the description of promissory notes for the payment of money, is bad. It should appear on the face of the indictment, that they are bank notes of some *incorporated* bank, or in some way that they are lawful notes. No unincorporated bank notes in *Pennsylvania* are at present the subject of larceny. *Spangler* v. *The Commonwealth.* 538

INFANCY.

The court will not discharge a defendant out of custody upon the ground of infancy, where there is no suggestion of fraud or imposition; but will leave him to make use of that fact upon his defence. *Clemson* v. *Bush.* 413

INSOLVENT DEBTOR.

If a debtor is discharged from a debt by the law of the state or territory where it was contracted, and the creditor resides in *Pennsylvania* and arrests him here, the rule is to discharge him on common bail, if the state where the debtor was discharged, extends the same courtesy to citizens of *Pennsylvania;* and it will be presumed that it does, until some reason is shewn to the contrary. *Smith* v. *Brown.* 201

INSURANCE.

1. An agent neglected to effect insurance according to a letter of instructions which stated that the owner *valued* the vessel at 4000 dollars, three fourths of which sum he wished to be insured. *Held* that he was answerable as in case of a valued policy, although the letter

contained no precise order to have the policy valued. *Miner* v. *Tagert.* 204

2. Where a policy has been effected as a mere cover for a wager, there can be no recovery. 205

3. An abandonment after acquittal, and after an order of restitution has been given by the court of last resort to the agent of the assured, is too late, notwithstanding it be made before actual restitution by the captors. *Adams* v. *The Delaware Insurance Company.* 287

4. It is the state of the *fact*, and not the state of the party's *information* at the time of an abandonment, that is to test its validity. *Ib.*

5. The owner of goods chargeable with general average, is personally liable for the amount of his contribution, notwithstanding he has abandoned to the underwriters. *Delaware Ins. Co.* v. *Delaunie.* 295

6. A paper which is not evidence *per se* in a suit between the underwriter and the assured, does not become so for any purpose, in consequence of having been exhibited by the latter to the former, as one of the preliminary proofs of loss. *Thurston* v. *Murray.* 326

7. Ship and goods belonging to the same owners, were insured from *Philadelphia* to *Barbadoes;* but the vessel by stress of weather was compelled to put into *Antigua*, where she was condemned and sold, and the voyage broken up. The goods were likewise sold, and the net proceeds of both were paid to the supercargo. The assured abandoned ship and goods, and recovered a verdict for a total loss in each case; but in adjusting the loss, they claimed to deduct out of the net proceeds of the goods which were to be credited to the underwriter, a *pro rata* freight to *Antigua. Held* that no freight *pro rata* was due. *Armroyd* v. *Union Insurance Company.* 437

8. If a *pro rata* freight had been earned in the preceding case, *quære* whether it would have belonged to the underwriter on ship by the abandonment, or to the owner of the ship, who had stood his own insurer as to freight? *Ib.*

9. A vessel insured at and from *Philadelphia* to *Amsterdam*, with liberty in case she should be turned off from *Amsterdam*, to proceed to some neighbouring port of discharge, was boarded on her passage by a *British* ship of war, and her papers indorsed with a direction not to proceed to any port at war with *Great Britain*, or which was shut against *British* ships, but to proceed to any port of *Great Britain* or *Ireland* for further directions. She then put into *Falmouth*, where in consequence of head winds, and with a view to obtain convoy, (the captain having there heard of the *Milan* decree) she remained nearly four months, and then sailed under convoy for the *Downs*, with intent from that place to proceed to *London* or *Amsterdam* according to advice. Shortly before she reached the *Downs*, a gale came on, which forced her into the *Downs* where she was totally lost. *Held* that the indorsement and warning justified the deviation to *Falmouth;* that the stay at *Falmouth* was justified by the weather, and by the necessity of obtaining convoy; and that even if the *Downs* were out of the course of the voyage to *Amsterdam*, yet the gale justified the captain's going in, and his design before he left *Falmouth* to put in there for advice, was but a mere intention to deviate, which did not affect the policy. *Snowden* v. *Phœnix Insurance Company.* 457

10. It is not a breach of a warranty of

neutrality, for the vessel insured to take convoy of a *British* ship of war, if during the voyage insured she has become exposed to the operation of the *French* decrees, in consequence of having been visited at sea by a *British* cruiser. 457

INTEREST.

1. An agreement was made between two contending claimants for money in the sheriff's hands, that the sheriff should deposit the amount in bank, until the question should be decided. The sheriff deposited it, but took it out soon after. *Held*, that the sheriff was bound to pay interest to the successful party, from the time the money was thus taken out of bank. *Commonwealth* v. *Crevor*. 121

2. In cases where interest is not of course, but depends on the conduct of the parties, if the defendant before suit offers to pay as much as is due, and the plaintiff refuses to receive it, the defendant is not liable to pay interest. But if the plaintiff insists on too much, and the defendant offers too little, there is a necessity for the suit, and the defendant must pay interest. *Delaware Ins. Co.* v. *Delaunie*. 295

JOINT PARTNERS.

See ACCOUNT RENDER.

JUDGE.

Quære whether a single judge of the Common Pleas can discharge a defendant from an execution issued by that court? *Hecker* v. *Jarret*. 404

JUDGMENT.

1. A judgment in *Pennsylvania* is a lien on every kind of equitable interest in land, vested in the debtor at the time of the judgment. *Held* therefore to bind the interest of a *Connecticut* settler in land within the seventeen townships, who was intitled by the act of 1799 to obtain a patent upon terms, although not he, but his assignee, after the judgment and the sale, complied with the terms, and then for the first time obtained a confirmation. *Carkhuff* v. *Anderson*. 4

2. A judgment not revived by *scire facias* within five years from its date, ceases to be a lien upon real estate, as well against subsequent judgment creditors, as against subsequent purchasers. *Bank of North America* v. *Fitzsimons*. 342

JURISDICTION.

See QUARTER SESSIONS.

1. The jurisdiction of a foreign court may be examined, not only as to the authority under which it is erected, but as to the subject over which it is exercised; but if the court is duly constituted, and has jurisdiction over the subject, its decrees *in rem* cannot be revised by the court of another nation. *Cheriot* v. *Foussat*. 220

3. The decree of a foreign prize tribunal of general jurisdiction, condemning property for having been concerned in the violation of law, is conclusive upon the point that the seizure of the property was made in conformity with the law, it being a matter within their jurisdiction to decide. *Ib.*

3. It is not necessary in order to give jurisdiction to a prize court, that the property captured should have been brought within the dominions of the captor. Seizure and safe pos-

session are all that are necessary to give jurisdiction, and whether the possession be within the dominions of the captor or a neutral, is immaterial. The possession of the particular captor is the possession of his sovereign every where. And although the property has been sold as perishable goods by the prize agent, and taken into the neutral country of the owner before condemnation, still the condemnation is valid, and confirms the original taking. *Ib.*

4. A court of common law has no jurisdiction of a cause whose object it is to recover property taken and condemned as prize, for having contravened a law of *France*, interdicting trade with her revolted subjects in *St. Domingo*. *Ib.*

JUSTICE OF THE PEACE.

See NEGRO AND MULATTO 2.

A magistrate cannot devest himself of his judicial capacity to administer an oath, while his commission is in force; and therefore whenever he administers an oath, it shall be taken to have been done judicially, although it does not so appear upon the face of the affidavit. *Commissioners of Berks* v. *Ross*. 539

JUSTIFICATION.

In trespass by the defendant in an execution against a justice of the peace, a constable, and the plaintiffs, the constable may justify under the warrant without shewing the judgment, if there is a several justification by him. *Kerlin* v. *Heacock*. 215

2. If two or more defendants plead not guilty "with leave to justify," it amounts to a several justification by each. *Ib.*

LARCENY.

1. The notes of an unincorporated bank in *Pennsylvania*, are not the subject of larceny. *Spangler* v. *The Commonwealth*. 533

2. So long as wild bees remain in the tree where they have hived, notwithstanding the tree is upon the land of an individual, and he has confined them in it, they are not the subject of a larceny. *Wallis* v. *Mease*. 546

LAW OF NATIONS.

See MUNICIPAL LAW.

LETTERS TESTAMENTARY.

As to personal property, the probate of a will is conclusive, while the letters testamentary remain unrevoked. As to realty, it is but *prima facie* evidence. *Coates* v. *Hughes*. 498

LIEN.

1. A judgment in *Pennsylvania* is a lien upon every kind of equitable interest in land, vested in the debtor at the time of the judgment. *Carkhuff* v. *Anderson*. 4

2. *Quære* whether a report of the auditors of commissioners' accounts is a lien upon the estate of the delinquent commissioner, unless it is filed in the office of the Common Pleas, by *order of the court*, and an entry of the order made upon the docket or court minutes. *Irish* v. *The Commonwealth*. 91

3. A judgment not revived by *scire facias* within five years from its date, ceases to be a lien upon the real estate of the defendant, as well against subsequent judgment creditors, as

subsequent purchasers. *The Bank of North America* v. *Fitzsimons.* 342

LIMITATIONS, ACT OF

It is the spirit of the act of limitations to allow twenty-one years from the time that a person might make an entry, and support an action, the statute not stopping after it has begun to run, in consequence of infancy, coverture or any other disability. But if a party has not a right of entry, but only a possibility which may give a right of entry at a future day, the statute does not run against him until that right accrues. Hence, notwithstanding the next heir in tail releases to the tenant in tail in possession, the statute does not run against the releasor, until the death of the tenant in tail without issue. *Lessee of Hall* v. *Vandegrift.* 374

MANDAMUS.

A mandamus does not lie to the Common Pleas to reinstate an appeal which they have dismissed, because in the first place their order of dismission is an award in the nature of a judgment, upon which a writ of error lies, and in the next place, a mandamus cannot go to an inferior court to compel them to make any particular decision, but merely to decide, which the Common Pleas have already done. *Commonwealth* v. *The Judges of the Common Pleas.* 273

Quære, Whether a mandamus lies from the Supreme Court to the Common Pleas? *Ib.*

MONEY HAD AND RECEIVED.

An action for money had and received will lie against an executor in his personal character, to recover a distributive portion of the testator's estate not disposed of by his will, and which has come to the executor's hands as trustee. *Wilson* v. *Wilson.* 557

MUNICIPAL LAW.

There is nothing in the law of nations to prevent a sovereign from punishing the violation of his penal municipal laws, by seizure on the high seas, out of his own territory, and not within the territory of any other sovereign. *Cheriot* v. *Foussat.* 220

NEGRO AND MULATTO.

1. When the record of the entry of a negro or mulatto child in the office of the clerk of the peace, under the act of 29th *March* 1788, does not bear any date, the jury must say whether it was made on or before the 1st of *April* 1789. *Jack* v. *Eales.* 101

2. The act of 29th *March* 1788, notwithstanding it authorizes and requires the clerk of the peace to administer to the claimant an oath in verification of the return he makes of the age and description of the child &c., does not prevent a justice of the peace from doing it by virtue of his general powers. *Ib.*

NEW TRIAL.

1. After two verdicts in favour of the same party upon a simple matter of fact, it must be an extraordinary case in which the court will grant a new trial, though they have an undoubted right to do it; but it is otherwise where matter of law has been

disregarded by the jury. *Lessee of Keble* v. *Arthurs*. 26

2. To justify a new trial, the mistake of the jury in law or fact must be plain, or the verdict must be decidedly against the evidence. It is not enough that the court did not look upon the evidence in the same light as the jury, or that they would not have found such a verdict themselves. *Griffith* v. *Willing*. 317

3. Upon granting a new trial, the court, if they think it expedient, will lay the party who applies for it, under a condition to try the merits without regard to the form of the declaration. *Welsh* v. *Dusar*. 329

4. There is no rule of law against granting a new trial after two concurring verdicts, nor will the court hesitate to do it, if the verdicts are against law. *Commissioners of Berks* v. *Ross*. 520

5. The principle which has governed courts in refusing the plaintiff a new trial, where his demand has been a *hard one*, does not in any degree apply to actions against sureties for the default of a principal. Although a surety may be distressed by the demand, yet it is not in point of law a *hard* one. *Ib.*

NON PROS.

If bail in error is not perfected within ten days after exception, the defendant in error is intitled to a non pros. *Tuggart* v. *Cooper*. 34

NOTICE.

See WARRANT AND SURVEY, 1. DEPOSITIONS 2.

A survey *returned* is legal notice. *Lessee of Cox* v. *Cromwell*. 119

OATH.

See JUSTICE OF THE PEACE. NEGRO AND MULATTO, 2. WARRANT.

PAROL EVIDENCE.

See TRUST.

PENITENTIARY.

Prior to the act of 4th *April* 1807, no person convicted of perjury in any of the counties in this state, except the county of *Philadelphia*, could be sentenced to imprisonment in the gaol and penitentiary of the city and county of *Philadelphia*. *Barlow* v. *The Commonwealth*. 1

PERJURY.

Persons convicted of perjury, are liable to fine and imprisonment at hard labour, but not to any particular kind of treatment as to diet or discipline. A sentence therefore which adjudges that the convict shall be confined, *fed*, *clothed*, and *treated* as the law directs, is erroneous. *Kræmer* v. *The Commonwealth*. 577

PLEADING.

1. The short entry of "not guilty with "leave to justify," by two or more defendants, may be considered a several justification by each defendant. *Kerlin* v. *Heacock*. 215

2. Slander of husband and wife cannot be joined in the same count. *Ebersell* v. *Krug*. 555

POWER.

If a power to sell is given to executors

by name, for the purpose of paying debts, they take it *ratione officii*, and it survives. *Lessee of Zebach* v. *Smith*. 69

PRACTICE.

1. If bail in error is not perfected within ten days after it is excepted to, the defendant in error is intitled to a non pros. *Taggart* v. *Cooper*. 34

2. The short entry of "not guilty with "leave to justify," by two or more defendants, is a several justification. *Kirlin* v. *Heacock*. 215

3. A rule to try or non pros, is in force from the time it is taken, until the cause is concluded, notwithstanding the cause may have been once tried during the existence of the rule, or continued at the instance of the defendant. *Thurston* v. *Murray*. 413

4. Under the general power of the Common Pleas to regulate its practice, it may require an affidavit of defence. *Vanatta* v. *Anderson*. 417

5. A defendant cannot upon the eve of trial withdraw a negative plea, to gain the conclusion to the jury by means of an affirmative plea that is left. *Waggoner* v. *Line*. 589

PRINCIPAL AND SURETY.

See NEW TRIAL, 5.

1. If the obligee undertakes to discharge the principal, or in any considerable degree to lessen his responsibility, without consulting the surety, the surety is discharged. But the mere acceptance of a common appearance in a suit by the obligee against the principal, in consequence of which the latter executed an assignment, to secure part of the debt, has no effect upon the obligation of the surety, although it furnished the principal an opportunity to leave the state. *Commissioners of Berks* v. *Ross*. 520

2. If a surety makes an agreement with one of two persons for whom he is bound, that if he the principal will pay one half the debt, he the surety will pay the other half for the other principal, and the one half is paid by the principal according to the agreement, the surety cannot maintain an action against both principals to recover the part that he has paid. *Duncan* v. *Keiffer*. 126

PRIZE.

See JURISDICTION, 2, 4.

PRIZE COURT.

See JURISDICTION 3.

PROBATE.

The probate of a will, so long as it remains unrepealed, is conclusive as to personal property, but only *prima facie* as to realty. *Coates* v. *Hughes*. 498

PROMISE.

See IMPLIED PROMISE.

PROTEST.

The protest of a master of a vessel is evidence in an action of replevin by the owner of the cargo, to recover it from the vendee of the captor. *Cheriot* v. *Foussat*. 227

PURCHASER.

See SHERIFF, 1, 2.

QUARTER SESSIONS.

The courts of Quarter Sessions of this state, have jurisdiction of all criminal offences which were not capital at the passing of the act of 22d of *May* 1722. Their jurisdiction remains unchanged, although since that act, several offences which were then felonies of death have ceased to be so. They accordingly have jurisdiction of perjury. *Kræmer* v. *The Commonwealth.* 577

RELINQUISHMENT.

See WARRANT AND SURVEY 4.

ROAD.

A report of a road by viewers &c. without a plot or draught in addition to the courses and distances, is bad. *Road from Warrior's Run.* 3

SCIRE FACIAS.

1. A private agreement for a stay of execution, renders a scire facias unnecessary until a year and a day after the stay is out. *Lessee of Dunlop* v. *Spicer.* 169

2. A judgment loses its lien absolutely, unless revived by *scire facias* within five years from its date. *Bank of North America* v. *Fitzsimons.* 342

SEIZURE.

There is nothing in the law of nations to prevent any sovereign from punishing the violation of his municipal laws by seizure on the high seas, out of his own territory, and not within the territory of any other sovereign. *Cheriot* v. *Fousat.* 220

SETTLEMENT.

See IMPROVEMENT 1, 2.

A slave has a settlement in the township where his master resides, which is bound in the first instance to support him, though it may have a remedy over against his master or his estate. So in the case of a manumitted slave, who has not acquired a settlement in another township since his manumission. *Overseers of Forks* v. *Overseers of Catawessa.* 22

SET-OFF.

1. If the defendant has an equitable demand against the plaintiff, as for instance a bond given by the plaintiff to a third person, and by him informally assigned to the defendant, the court will permit him either to set it off against the plaintiff's demand, or give it in evidence under the plea of payment. *Murray* v. *Williamson.* 135

2. It is not essential to a set-off that the defendant should be able to sue for it in his own name. *Ib.*

3. There is nothing in the defalcation act of *Pennsylvania* to exclude a set-off either by or against an executor or administrator. On the contrary that act has uniformly been construed to admit it. *Ib.*

4. A judgment against *A* was assigned to *B* to secure money lent to *A*, and which *A* covenanted by articles of agreement to repay on a certain day. The court refused to stay execution upon this judgment to give a time to obtain a verdict against *B* for damages in consequence of *tortious* acts by him in breach of his covenants in the same articles; though it seems they would, had *A's* claim been for mo-

ney paid, or any other matter susceptible of liquidation. *Lessee of Dunlop* v. *Speer*. 169

5. Damages for breach of contract may be set off under the defalcation act of *Pennsylvania*. *Ib.*

SHERIFF.

See EVIDENCE, 9.
INTEREST, 1.

1. As between a debtor or his representatives and the sheriff who sells the debtor's land by execution, a purchase by the sheriff, or by any one in trust for the sheriff, without the debtor's consent, is void; but if the debtor consented to such a purchase, his representatives cannot impeach it; and even if he did not know or consent, the sale cannot be disturbed to the prejudice of a *bona fide* purchaser without notice. *Lessee of Lazarus* v. *Bryson*. 54

2. There is no difference between a sheriff and a common trustee, as to the right of either to become the purchaser at a sale of the property under his control, or as to the effect of such a purchase upon a subsequent purchaser without notice. *Ib.*

SHERIFF'S SALE.

See SHERIFF.

SLANDER.

1. If referees in an action of slander, award to the plaintiff a sum under forty shillings *with costs*, he is intitled to no more costs than damages. *Secus* if they award *full* costs. The Supreme Court has adopted the English rule, that although the court is bound by the statute, the jury is not, but may give 10*l*. costs, though they only give 10*d*. damages. *Stuart* v. *Harkins*. 321

2. "I have lost a calfskin out of my "cellar the day that you and *Born*- "*man* got the leather, and there "was nobody in the cellar but you, "*Bornman*, and *Gray*; and I do not "blame you nor *Gray*, but *Born*- "*man* must have taken it," is slander, without any colloquium of a felony. *Bornman* v. *Boyer*. 515

3. After the words laid in the declaration are proved, the plaintiff may give in evidence other words, actionable in themselves, and spoken since the suit brought, to shew the malice of the defendant. *Wallis* v. *Mease*. 546

4. Slander of husband and wife cannot be joined in the same count. *Ebersoll* v. *Krug*. 555

SLAVE.

See SETTLEMENT.

SPECIAL BAIL.

See BAIL, 1, 2, 3.

STATUTES.

For the *British* statutes in force within the state of *Pennsylvania*, see the Report of the Judges of the Supreme Court, made to the legislature in *December* 1808. 595 *et seq.*

SURETY.

See PRINCIPAL and SURETY.

SURVEY.

See WARRANT and SURVEY.

SURVEYOR.

Although a deputy surveyor is not intitled by law to the full fees of a survey, unless all the lines are run and marked, yet if an imperfect survey has been accepted by the owner without objection, and the full fees paid to the deputy surveyor, the latter cannot claim to diminish the usual compensation of the surveyor who performed the work under him, by objecting to the manner in which the work was done. *Rose* v. *Evans*. 50

TENANTS IN COMMON.

See ACCOUNT RENDER.

TRESPASS.

See JUSTIFICATION, 1.

When a court has jurisdiction of the action, their officers are not responsible for errors in process. *Hecker* v. *Jarret*. 404

TRUSTEE.

See SHERIFF.

TRUST.

The act of frauds and perjuries of the state of *Pennsylvania*, does not prevent a declaration of trust from being made by parol. Hence in an ejectment by the devisees of *A* against *B*, it is competent to give parol evidence of the declarations of *A*, that the land she had purchased in her own name, was bought for the use of *B*, with money in which her husband had given her only a life estate by his will, and had devised it to *B* after her death. *Lessee of German* v. *Gabbald*. 302

VALUED POLICY.

See INSURANCE, 1.

WAGER.

See INSURANCE, 2.

WARRANT.

A warrant of arrest, issued upon common rumor and report of the party's guilt, though it recite that there was danger of his escaping before witnesses could be summoned to enable the judge to issue it upon oath, is illegal, and the constable to whom it is directed is not bound to execute it. *Conner* v. *The Commonwealth*. 38

WARRANT AND SURVEY.

See EVIDENCE, 2.

1. If a party knows of a survey having been made for another, and returned to the land-office, without any improper conduct in the person obtaining it, it is against equity to permit him to take advantage of those irregularities in the survey, over which the owner of it had no control. *Lessee of Keble* v. *Arthurs*. 26

2. A return of survey is strong presumptive evidence that a regular survey has been made on the ground; and it lies upon the party objecting to it, to shew that it has

not, by such circumstances as are inconsistent with a survey. *Lessee of Wirt* v. *Stevenson.* 35

3. What is a reasonable description in a warrant. *Ib.*

4. The owner of a prior warrant and survey upon which the purchase money is paid, is not barred either in law or equity from recovering in ejectment, notwithstanding there has been a decision against him by the board of property in consequence of his neglecting to attend the hearing upon a caveat, and he has lain by *fifteen years* after that, during which the party in whose favour the caveat was decided, has paid his purchase money, obtained a patent, and made improvements on the land. Although the owner of such warrant and survey, may relinquish the land, yet when the purchase money is paid, these circumstances are not sufficient evidence of relinquishment. The omitting to take actual possession of the land is no evidence of it, nor can the delay to bring an ejectment be a bar, if it be for a length of time less than that prescribed by the act of limitations. *Lessee of Cox* v. *Cromwell.* 114

5. A recital in a warrant of acceptance is good evidence against the proprietary, but not against third persons claiming adversely to the survey, under a title which commenced before the return of survey. *Lessee of Bonnet* v. *Devebaugh.* 175

WILL.

See LETTERS TESTAMENTARY.

A subsequent marriage and birth of posthumous or other issue, do not amount by the law of *Pennsylvania* to a total revocation of a will, even where the subsequent issue is the testator's only child. They amount to a revocation *pro tanto*, namely, so far as regards the widow and child, but not as to the appointment of executors, nor as to a power to sell for the payment of debts. *Coates* v. *Hughes.* 498

WITNESS.

1. A leading question must be objected to at the time it is put to the witness. If no exception is then taken by the opposite party, the answer of the witness to the leading question, cannot be opposed upon that ground, when his deposition is read upon the trial. *Sheeler* v. *Speer.* 130

2. If the subscribing witness to a bond is out of the jurisdiction of the court, and upon diligent inquiry no person can be found within the jurisdiction, who can prove his handwriting, the handwriting of the obligor may be proved. *Clark* v. *Sanderson.* 192

3. A plaintiff who after the commencement of the suit, has made a voluntary assignment of all his property to creditors, and has also executed a release to the assignees of all his interest in the money which may be recovered in the action, is a competent witness in the cause, provided all the costs are paid before he is sworn. *Steele* v. *Phœnix Ins. Co.* 306

4. The widow is a good witness to establish a *donatio causa mortis* by her husband. *Wells* v. *Tucker.* 366

WRITTEN INSTRUMENTS.

The construction of written instruments is the province of the court; and it is of the utmost importance that this province should not be invaded by the jury. *Welsh* v. *Dusar.* 329

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